SUPREME COURT OF THE UNITED STATES.

No. 370.

THE SOUTH FORK CANAL COMPANY ET AL., APPELLANTS,

vs.

GEORGE GORDON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

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1 In the district court of the United States for the northern district of California, in equity.

To the judge of the district courts of the United States for the northern district of California:

George Gordon, an alien, a resident of the city of San Francisco, brings this his bill against the South Fork Canal Company, a corporation organized and existing under the laws of the State of California and composed of citizens of said State, and D. K. Newell, Benjamin F. Keene, William H. Smith, John Buchanan, Dr. Stanly F. Childs, Daniel J. Lisle, John A. Reed, C. C. Batterman, Obed Harney, Ralph Reynolds, jr., John Kirk, Andrew T. Binney, A. T. Taylor, Charles de Ro, and Edward M. Church, all citizens of the United States; and thereupon your orator complains and states: That the said South Fork Canal Company is a corporation organized for
2 the purpose of carrying the waters of the south fork of the American river from a high point amongst the spurs of the Sierra Nevada mountains to the summits of the hills and the high mining grounds surrounding the town of Placerville, in the State of California, by means of a dam thrown across said river and a canal or flume constructed of plank and frame-work supported on piles let into the soil, extending for the whole distance along the steep inclined side of a spur or spurs of the aforesaid Sierra Nevada mountains. That about the month of February, one thousand eight hundred and fifty-three, the said company by public advertisements invited proposals from contractors for the doing of parts of said work, and that your orator and one Alonzo Kinyon bid for a portion thereof, and their bid having been accepted by the said company, that they did in pursuance thereof afterwards, and on the fifteenth day of March, one thousand eight hundred and fifty-three, enter into a contract with the said company, of which a copy is annexed hereto and
3 marked Schedule A.

And your orator further shows that, at the time of executing and entering into said contract, he was not nor had he ever before been a copartner of the said Kinyon; that your orator was a civil engineer and contractor by profession, residing in the city of San Francisco, and that the said Kinyon possessed some practical experience in work of a like character to that contemplated by the said contract, and was competent to superintend the doing of the work and direct the laborers employed, but that he possessed no considerable means or capital; and your orator was only induced to take him as an associate in the making of said contract for the sake of securing his personal labor and services in the performance of the work, and in superintending the laborers employed thereon, to which the said Kinyon had been highly recommended by the officers of the said company, and in particular by the defendant, A. T. Binney, who
4 was their chief engineer. That it was distinctly understood and agreed between your orator and the said Kinyon, that your orator should be entitled to interest on his capital employed on said work at the rate of four per cent. per month, and after payment

of such interest and the principal sum advanced, two-thirds of all the gains, profits, and advantages to be derived from the performance of such contract, and the said Kinyon to one-third thereof, and that the said company and its trustees, directors, and officers were aware of all the foregoing facts before or at the time of making said contract, or during the execution of the work done under the same, as hereinafter stated.

And your orator further shows that, for the faithful performance of the said contract, the said company and its officers required your orator and the said Kinyon to execute and deliver to the said company their obligation, in the penal sum of fifty thousand dollars,
5 conditioned for the faithful performance of said contract, and the said officers for the purpose of being assured that such bond did afford sufficient security to the said company therefor required that your orator should make oath to the value of his property and means, and submit to an examination on oath with respect thereto, in the manner in which bail or other sureties usually justify in the course of legal proceedings, which your orator did, but that such oath was not made nor such examination submitted to by the said Kinyon, because it was personally well known to all or most of the officers of the said company that he was not possessed of any considerable means, and not exceeding the amount of three thousand dollars at the utmost.

And your orator further shows to this court that the sections of the said canal designated in said contract as sections from seventeen to twenty-five inclusive, were each of one mile in length, and that their course ran principally along the side of a deep ravine,
6 and through a country entirely new, uninhabited, and destitute of all facilities for the doing of such work, such as roads, bridges, and other improvements; that the time allowed for the completion of the work under such contract was the shortest time within which it could have been done by any possibility, and that it was absolutely necessary, in order to enable it to be done in such time, that your orator and the said Kinyon should have been furnished forthwith with the grades of the said work, inasmuch as without that information they would not know where the canal was to be constructed or placed, nor could they even commence the necssary grubbing, clearing, or excavation for the same, and that until the said grades and levels were ascertained, fixed, and designated the work of constructing those sections of said canal was not ready to commence, and that for the purpose of proceeding to perform their said contract as promptly and speedily as possible your orator and the said Kinyon, on the
7 day after signing of said contract, went upon the ground where the canal had to run, in order to commence work, and then discovered that no grade marks had been placed there, as is usual, and that in fact the grades required were in no way designated or indicated, so that it was impossible to commence said work for want thereof. That they thereupon, on the nineteenth and twentieth of March, requested in writing from the said company to be furnished with the grades and levels along the whole line of that part of

the said proposed canal embraced in the said contract, but that the said company, notwithstanding the said request, and although they were often subsequently requested to furnish said levels and grades, did not furnish the same before the seventeenth of April, one thousand eight hundred and fifty-three, thereby consuming almost one-third of the whole time allowed for the building of the whole of the work of said canal undertaken by Gordon and Kinyon, to the great injury and damage of your orator and the said Kinyon. That the work
8 embraced in the said contract runs for nine miles along the precipitous sides of an immense ravine, at the bottom of which flows the south fork of the American river, and that the course of the canal is along the side of said ravine, at distances ranging from eight hundred to two thousand feet below the high table-land from which the materials for said canal had to be procured, and that the work had to be necessarily commenced at the upper end of the line, at which point the said grades and levels were not finished till three weeks after the making of said contract. That all the said time that your orator and the said Kinyon were so delayed in the commencement and prosecution of said work for want of such grades and levels was the most favorable season for procuring labor cheaply of all the time wherein they were required by the contract to perform said work, and that the doing of the same was much enhanced in cost by the delay in furnishing said grades and levels, and that the
9 damage sustained by your orator and the said Kinyon from this cause amounted to nine thousand dollars or thereabouts.

And your orator further shows unto this court that for the proper and profitable performance of the said contract by them the position, form, and depth of the foundations for the trestle-work on which the flume of the canal was to rest were of very great importance, and it was also of great importance for the same objects that they should receive detailed directions for said work from the engineer in charge of said work, and in view of these facts the said contract provided that they should work under the superintendence of the engineer of said company, and that the pits for foundations for mechanical structures should be excavated in such forms, depths, and dimensions as should be laid out by said engineer; and although the last mentioned premises were well known to the said company, yet that no engineer of said company ever did give them any detailed directions
10 about said work, nor did any such engineer lay out the forms, depths, or dimensions of any of the pits for foundations of mechanical structures, whereby your orator and the said Kinyon were hindered in the prosecution of said work and sustained great risk, loss, and damage in causing and procuring the same to be laid out, and in causing the work generally to be engineered and superintended, and that the loss and damage of your orator and the said Kinyon sustained in consequence thereof amounted to the sum of three thousand dollars, or thereabouts.

And your orator further shows to this court that, notwithstanding that the said company had so broken their said contract, your orator and the said Kinyon went on and prosecuted the work of repairing

the tools and necessary appliances for the building of said canal, and did prosecute the building and construction thereof in pursuance of said contract, and in the course of doing so they erected in the vicinity of the line of said canal two steam saw-mills for the pur-
11 pose of preparing the timber necessary to be used therein, besides other machinery, houses, and encampments for the workmen, railroad slides, and timber slides, and provided a large amount of tools, sufficient to supply three hundred workmen, and built roads to render the line of the canal accessible, all of which work was necessary preparatory to the actual construction of the canal, by reason of the rough and savage nature of the country through which the same had to pass, and in which preparatory work your orator expended over thirty-nine thousand dollars in cash. That in the course of constructing the said canal your orator and the said Kinyon, besides doing a large amount of work on the actual grade of the said canal, prepared a great quantity of hewn and sawn timber for use in and about the erection thereof, and in the first day of May
12 had as much as thirty thousand feet of such timber prepared and completed, being of the value, according to the prices specified in the said contract, of about three thousand five hundred dollars, and which timber, under the said contract, should have been included in the estimate of work done up to that time; yet that the said company, although well knowing the premises, caused an estimate of the work done up to the first of May to be made by their engineer, but declined to include in said estimate or to pay within twenty per cent. of any of the work done in getting out or hewing or sawing said timber, whereby your orator and the said Kinyon were further injured and damaged, and the said contract further broken by the said company.

Your orator further shows that on the twenty-ninth day of April, 1853, he and the said Kinyon were expressly directed by the engineer of said company to place seventy-five men at getting out
13 timber for the construction of said canal, that said men were so employed, and on the first day of June, one thousand eight hundred and fifty-three, had got out at the brow of the hill on the side whereof the said canal was to run a large amount of timber for the building thereof, in pursuance of said orders and directions, and that the same under said contract was of the value of about ten thousand dollars. That on the first day of June your orator and the said Kinyon had also prepared and had ready a large number of sills for said canal, and had done a large amount of other work on the said canal, yet the said company declined to include the same in the second monthly estimate, (which was made on the fourth and fifth of June, instead of the first,) whereby, although there was at that time justly due to your orator and the said Kinyon under the said contract between twenty-five and thirty thousand dollars, yet
14 the said company, through its engineer, wrongfully estimated the total amount of work done at a little less than twenty thousand dollars, and only admitted to be due to your orator and the said Kinyon, as eighty per cent. thereof, a sum of money the exact amount

of which your orator is unable to state, but which was, as he charges, between fifteen and sixteen thousand dollars, and very near the latter sum.

Your orator further shows that so large an amount of money being locked up in the preparatory work hereinbefore stated, it was indispensable and essential that your orator and the said Kinyon should receive their payments from the said company as the same became due under the contract, punctually; yet the said company, well knowing the premises, and well knowing that your orator and the said Kinyon had taken measures to muster all their workmen to receive their payments on the seventh day of June, and although they
15 acknowledged that they owed your orator and the said Kinyon about sixteen thousand dollars under said contract, totally declined and refused and failed to pay to them more than the sum of about four thousand dollars, leaving due to your orator and the said Kinyon eleven thousand and seven hundred and fifty dollars, according to their own estimates, and which, according to their own admission, they should then and there have paid. By which non-payment your orator and said Kinyon (having relied on the receipt of such payment therefor) were unable to pay their workmen assembled from all parts of the work to receive their wages, great numbers of whom in consequence left their work, refusing to continue any longer thereat. By which means the credit and authority of your orator and the said Kinyon were so damaged with the laboring classes in that neighborhood that they could no longer procure men to work for them on as favorable terms or in as large numbers as before, and could
16 only with great difficulty induce any to do so.

And your orator further shows that, finding the said company could not or would not perform their said contract by making the payments aforesaid, and believing the said company to be insolvent, which your orator charges they then were, entirely unable to meet their present or future payment, from the fact that their promissory notes in large amounts were remaining unpaid and currently selling at thirty cents on the dollar, that large numbers of their own workmen were unpaid and clamoring for their wages, and from the public statement of their officers at a meeting of the company on the sixth day of June, in which they represented the company without funds and over one hundred thousand dollars in debt; your orator and the said Kinyon did, on the seventh day of June, one thousand eight hundred and fifty-three, notify the said company by letter that they considered the said contract at an end, and that they
17 would no longer continue the performance of it, but offered, for the sake of enabling the company to make arrangements for the completion of the work, to continue their men at work for six days further at their own expense, a copy of which letter is hereto annexed and marked "B," and to which for greater certainty your orator prays leave to refer. And your orator is advised, and humbly insists, that from the time of sending said letter to the said company the said contract was abandoned, and the connexion between your orator and the said Kinyon dissolved, and any authority which either

of them had to bind the other by his acts was revoked by operation of law, and that such was the understanding between your orator and the said Kinyon.

And your orator further shows that, in pursuance of the proposal contained in said letters of the seventh of June, and actuated by an earnest desire to serve the said South Fork Canal Company, and enable it to prosecute the construction of its canal without interruption, and thus render available the large amount of preparatory work done as before stated, your orator and the said Kinyon continued the employment of a large force of laborers, about one hundred and fifty or one hundred and sixty in number, being as many as would remain after the non-payments aforesaid, for a week after the said recision of said contract, at the expense of your orator, for the purpose of enabling said company during that interval to make some other arrangements for the construction of their work, but that no such arrangements having been made by it, your orator and the said Kinyon at the end of said week disbanded said men, and your orator was compelled afterwards, from his own private means, to provide for and pay the wages of all of the workmen who had been employed on the said work done to that period, and all the other expenses and disbursements incident to the partial fulfilment of said contract down to that period, and has actually disbursed in and about the doing hereof the sum of seventy-three thousand three hundred and eighty-three dollars and ninety-four cents over and above all sums received from the said South Fork Canal Company.

Your orator further shows that the actual value of the work done by your orator and the said Kinyon on the said canal and in the performance of the said contract amounted, at the prices stipulated for the same in said contract, to the sum of fifty-five thousand dollars and over, and that besides the work done in the actual construction of said canal, they had done a large amount of preparatory work essential thereto, and made a large amount of preparatory expenditures towards building said canal, such as providing tools on the line of the said canal for three hundred workmen, erecting houses and encampments, constructing roads, railroad slides, timber slides, and two steam saw-mills, which had cost your orator and the said Kinyon over thirty-nine thousand dollars, and were actually worth over forty-nine thousand dollars, and the whole or nearly all whereof were rendered useless, and a total loss, by the failure of the said company to prosecute said work and proceed in the performance of said contract.

Your orator further shows that had the said company performed the stipulations of said contract on their part, or had your orator and the said Kinyon been thus enabled to go on and complete the performance of said contract on their part, they would, according to the best judgment and belief of your orator, have realized a profit of over twenty thousand dollars.

And your orator further shows that, at the time your orator and the said Kinyon stopped the work on said canal, on the seventh of June

as aforesaid, they had performed about one-half of the whole labor to be performed for the completion of the whole of said work con-
21 tracted for, and had actually advanced cash and received liabilities (which liabilities your orator has since paid, excepting only a sum of four thousand eight hundred dollars, which yet remains due) to the amount of about eighty-four thousand dollars, the whole of which money (with the exception of six thousand four hundred dollars received from said company as hereinbefore stated) was advanced by your orator from his individual resources, of which fact the defendants were, as your orator charges on his belief, well aware prior to the twenty-eighth of June, one thousand eight hundred and fifty-three.

Your orator further shows that, after the work under said contract had been entirely abandoned, and the said workmen employed in the performance thereof had been disbanded as aforesaid, and your orator's connexion with the said Kinyon had been entirely dissolved, various negotiations were had between your orator and the said company, and between the said Kinyon and the said company,
22 aiming at a compromise of their difficulties, wherein your orator acted solely for himself and with reference to his own individual interest, and the said Kinyon acted solely for himself and with reference to his individual interest, in the course of which negotiations the said company, through its chief officers and directors, received distinct notice that neither your orator nor the said Kinyon had any right or power to act for or commit the other to any proposal or do more than settle for his individual interest in their claim against the said company; that most of said negotiations were conducted in writing, and that in the course of them your orator sent to the said company, on the thirteenth day of June, one thousand eight hundred and fifty-three, a letter, a copy whereof is hereto annexed, marked C, which letter your orator, in his information and belief, charges was received by the president and directors of the said company, or some or one of them, on that or the next day,
23 and which was the last communication which your orator addressed to the said company or had with them on behalf of said Kinyon and himself. That on the same thirteenth day of June your orator addressed to the president and directors of said company another letter, a copy whereof is hereto annexed, marked D, and the original whereof your orator charges was duly received by the said president and directors on the fourteenth or fifteenth day of June aforesaid. That on the fourteenth day of June, 1855, your orator addressed and sent to the president and directors of said company another letter, a copy whereof is hereto annexed and marked C, and the original whereof your orator charges on his like information and belief, was received by the said president and directors on or about the fifteenth of said month of June.

And your orator further shows that, during about the same
24 period, to wit, from about the thirteenth to the twenty-seventh of the same month of June, the said company were engaged in negotiations with the said Kinyon for the settlement of his

of them had to bind the other by his acts was revoked by operation of law, and that such was the understanding between your orator and the said Kinyon.

And your orator further shows that, in pursuance of the proposal contained in said letters of the seventh of June, and actuated by an earnest desire to serve the said South Fork Canal Company,
18 and enable it to prosecute the construction of its canal without interruption, and thus render available the large amount of preparatory work done as before stated, your orator and the said Kinyon continued the employment of a large force of laborers, about one hundred and fifty or one hundred and sixty in number, being as many as would remain after the non-payments aforesaid, for a week after the said recision of said contract, at the expense of your orator, for the purpose of enabling said company during that interval to make some other arrangements for the construction of their work, but that no such arrangements having been made by it, your orator and the said Kinyon at the end of said week disbanded said men, and your orator was compelled afterwards, from his own private means, to provide for and pay the wages of all of the workmen who had been employed on the said work done to that period, and all the other expenses and disbursements
19 incident to the partial fulfilment of said contract down to that period, and has actually disbursed in and about the doing hereof the sum of seventy-three thousand three hundred and eighty-three dollars and ninety-four cents over and above all sums received from the said South Fork Canal Company.

Your orator further shows that the actual value of the work done by your orator and the said Kinyon on the said canal and in the performance of the said contract amounted, at the prices stipulated for the same in said contract, to the sum of fifty-five thousand dollars and over, and that besides the work done in the actual construction of said canal, they had done a large amount of preparatory work essential thereto, and made a large amount of preparatory expenditures towards building said canal, such as providing tools on the line of the said canal for three hundred workmen, erecting houses and encampments, constructing roads, railroad slides, timber slides, and two steam saw-mills, which had cost your orator and the said
20 Kinyon over thirty-nine thousand dollars, and were actually worth over forty-nine thousand dollars, and the whole or nearly all whereof were rendered useless, and a total loss, by the failure of the said company to prosecute said work and proceed in the performance of said contract.

Your orator further shows that had the said company performed the stipulations of said contract on their part, or had your orator and the said Kinyon been thus enabled to go on and complete the performance of said contract on their part, they would, according to the best judgment and belief of your orator, have realized a profit of over twenty thousand dollars.

And your orator further shows that, at the time your orator and the said Kinyon stopped the work on said canal, on the seventh of June

as aforesaid, they had performed about one-half of the whole labor to be performed for the completion of the whole of said work con-
21 tracted for, and had actually advanced cash and received liabilities (which liabilities your orator has since paid, excepting only a sum of four thousand eight hundred dollars, which yet remains due) to the amount of about eighty-four thousand dollars, the whole of which money (with the exception of six thousand four hundred dollars received from said company as hereinbefore stated) was advanced by your orator from his individual resources, of which fact the defendants were, as your orator charges on his belief, well aware prior to the twenty-eighth of June, one thousand eight hundred and fifty-three.

Your orator further shows that, after the work under said contract had been entirely abandoned, and the said workmen employed in the performance thereof had been disbanded as aforesaid, and your orator's connexion with the said Kinyon had been entirely dissolved, various negotiations were had between your orator and the said company, and between the said Kinyon and the said company,
22 aiming at a compromise of their difficulties, wherein your orator acted solely for himself and with reference to his own individual interest, and the said Kinyon acted solely for himself and with reference to his individual interest, in the course of which negotiations the said company, through its chief officers and directors, received distinct notice that neither your orator nor the said Kinyon had any right or power to act for or commit the other to any proposal or do more than settle for his individual interest in their claim against the said company; that most of said negotiations were conducted in writing, and that in the course of them your orator sent to the said company, on the thirteenth day of June, one thousand eight hundred and fifty-three, a letter, a copy whereof is hereto annexed, marked C, which letter your orator, in his information and belief, charges was received by the president and directors of the said company, or some or one of them, on that or the next day,
23 and which was the last communication which your orator addressed to the said company or had with them on behalf of said Kinyon and himself. That on the same thirteenth day of June your orator addressed to the president and directors of said company another letter, a copy whereof is hereto annexed, marked D, and the original whereof your orator charges was duly received by the said president and directors on the fourteenth or fifteenth day of June aforesaid. That on the fourteenth day of June, 1855, your orator addressed and sent to the president and directors of said company another letter, a copy whereof is hereto annexed and marked C, and the original whereof your orator charges on his like information and belief, was received by the said president and directors on or about the fifteenth of said month of June.

And your orator further shows that, during about the same
24 period, to wit, from about the thirteenth to the twenty-seventh of the same month of June, the said company were engaged in negotiations with the said Kinyon for the settlement of his

individual interest in the claim of your orator and himself against the said company, which, or some part of which, were conducted in writing, of the exact particulars whereof your orator is ignorant and prays a full discovery from the said defendants.

Your orator further shows that, failing to procure any payment for the work done or money advanced for the said company, your orator caused a notice of lien, pursuant to the statute of the State of California, to be filed in the office of the recorder of Eldorado county, in which county the works of the said South Fork Canal Company are situated, giving notice that your orator and the said Kinyon claimed a lien on the works known as the South Fork canal for one hundred and six thousand four hundred and eighteen dollars,
25 for the work and labor and materials furnished and provided for the said company, hereinbefore expressed, to which notice of lien on file, or to a copy thereof to be produced and proved, your orator, for greater certainty in the premises, prays leave to refer, and which notice of lien was filed in the name of George Gordon and Kinyon, because your orator was advised it was necessary to do so for the purpose of complying with the requirements of the said law of the State of California.

And your orator further shows that, for the purpose of enforcing said lien and collecting said demand from the said company, he caused a suit to be brought against the said South Fork Canal Company in the district court of the fourth judicial district of the State of California, which suit was commenced about the twenty-third day of June, one thousand eight hundred and fifty-three, and was brought
26 in the name of the said Kinyon and your orator because your orator was advised by counsel that it was necessary to do so.

Your orator further shows that after the said suit was commenced, and about the twenty-seventh or twenty-eighth day of June aforesaid, the defendants, the South Fork Canal Company, through its officers and agents hereinafter mentioned, combining and confederating together to defraud your orator and to obtain without compensation a release of the large demand of your orator and the said Kinyon against the said company and a discharge of the lien for the amount thereof on the said South Fork canal so existing as aforesaid, resolved to take advantage of the poverty of the said Kinyon and to bribe him to execute a release of said demand for the purpose of setting up said release as a defence to said suit, and thus defrauding your orator of the amount justly due to him as aforesaid. That with this view
27 and intention the said defendant, the said South Fork Canal Company, through the defendants, B. F. Keene, W. H. Smith, A. T. Taylor, John Buchanan, Dr. Stanly F. Childs, O. Harney, Ralph Reynolds, F. A. J. Binney, D. K. Newell, C. C. Battermany, who were then its officers and agents, some or one of them, or some person or persons on the behalf of them, or of some or one of them, entered into negotiations with the said Kinyon. That the said Kinyon was at the said period without money, destitute, or nearly so, of means or resources, and indebted to the said company on two other contracts which he had entered into with them, one in connexion

with one James S. Law, and the other, alone, for the erection of the Coon Hollow aqueduct, a portion of said South Fork canal, and only interested in the recovery to be had in the said suit, the extent of one-third of the profits on the work actually done on said canal, after payment of interest to your orator as aforesaid, and not exceeding
28 on any calculation the sum of five thousand dollars, and which was liable, if the suit were delayed, to be absorbed by the accruing interest to your orator. That the said Kinyon at first offered to sell to the said company or to the said defendants last named his interest in the said contract and the profits thereon for the sum of five thousand dollars, which offer was not accepted; that the said negotiations were continued through two or three days, during which time the whole thereof were kept studiously secret from your orator and conducted in an entirely private manner, the board of directors of the said company sitting, contrary to their usual practice, with closed doors and with an agreement or understanding among the members thereof that nothing of their proceedings in the premises should be divulged until the said negotiations should be completed, or some similar agreement or understanding; and that, finally, as your orator
29 has since been informed and believes, the said negotiations were brought to a close at about midnight on the twenty-eighth of June, one thousand eight hundred and fifty-three, when the said Kinyon agreed for a bribe, nominally, of five thousand dollars, payable two thousand dollars in cash and three thousand dollars in stock of said company at par, as hereinafter mentioned, to execute a release of all the said demand in favor of your orator and himself against the said company, on the condition and agreement, or with the understanding, that the directors thereof should preserve the said transactions entirely secrect until the said Kinyon should have an opportunity of secretly leaving the State of California in the steamer which was to sail for San Juan del Sud on the first of July. That, accordingly, about midnight of said twenty-eighth of June the said Kinyon executed the release, a copy whereof is hereto annexed, marked
30 F, and the original whereof is now in possession of the said defendants or some of them, and to which original, when produced, your orator prays leave to refer for greater certainty in the premises. That said release was prepared, as your orator is informed and believes, by the defendant D. K. Newell, who was at that time the legal adviser of the said company and was also largely interested therein as a stockholder, and that the said Kinyon was persuaded and induced to receive the said bribe and enter into the said corrupt conspiracy and execute the said release by the defendants, O. Harney, one of the directors, the said D. K. Newell, a stockholder in and the legal adviser and agent of said company, A. T. Binney, the chief engineer of, and also a large stockholder in, said company, W. H. Smith, a director and stockholder, and John Kirk, a large stock and
31 bond holder in said company, and the other defendants last above named, or some of them, and that the said defendants were well aware that in executing the same the said Kinyon was perpetrating a gross fraud on your orator; and your orator, being ignorant

of the particular inducements and persuasions held out to the said Kinyon by the said defendants for the execution thereof, prays a full discovery and disclosure in the premises from the said defendants. And your orator further shows that the bribe so as aforesaid agreed to be paid to the said Kinyon for executing said fraudulent release was paid, two thousand dollars in cash and three thousand dollars in stock of the said South Fork Canal Company at par, which stock, your orator charges, was entered on the books of said South Fork
32 Canal Company, not in the name of said Kinyon, but in the name of Elizabeth Kinyon or the name of some other female, also for the purpose of defrauding your orator and preventing him from reaching the same by any process of law, and that the payment thereof and execution and delivery of said release took place in Placerville, in Eldorado county, whilst your orator was in the city of San Francisco, the place of his residence, and that not only was no notice given to your orator of such negotiations and proceedings while the same were pending or after their consummation, but, lest any rumor thereof might reach you orator in San Francisco before the said Kinyon should have time to leave on the steamer of first of July for the Atlantic States via San Juan del Sud, as aforesaid, the said transaction was kept profoundly secret at Placerville, (where the
33 office of the said company was situated, and where its relations with your orator were a common topic of conversation and public interest, and where any item of intelligence respecting it would have at once become almost universally known if once divulged,) until after eight o'clock of the morning of the thirtieth of June, when it became no longer possible for the intelligence thereof to reach your orator before the departure of the said Kinyon. That, as your orator is informed and believes, at about noon of the thirtieth of June aforesaid, the execution of the said release by the said Kinyon was first divulged by the said defendants or some of them, and the same immediately thereafter became publicly known and a general subject of conversation at Placerville aforesaid.

Your orator further shows that, about four o'clock on the morning of the twenty-ninth of June, the said Kinyon clandestinely
34 left Placerville for San Francisco, and on the first day of July, one thousand eight hundred and fifty-three, secretly left San Francisco on the steamer for the Atlantic States via San Juan del Sud, in Nicaragua, unknown to your orator, and without having disclosed to him his presence in the city of San Francisco, or his intention to leave the State of California, or any of the preceding circumstances, and has since remained absent from the State.

Your orator further shows that the aforesaid suit in the district court of the fourth district of the State of California having been brought in the name of your orator and the said Kinyon jointly, the said defendant, the South Fork Canal Company, set up the said release so executed by the said Kinyon as a bar thereto in their answer to the complaint, and your orator being advised that he could
35 not successfully prosecute the said suit furthur, discontinued the same, on or about the eighth day of June, one thousand eight hundred and fifty-four.

Your orator further shows that, on the seventh day of July, one thousand eight hundred and fifty-three, he caused to be filed in the office of the recorder of Eldorado county, a second or supplementary notice of lien, of which a copy is hereto annexed, marked G, and that on the fourth day of July, one thousand eight hundred and fifty-three, your orator despatched to the directors of the said company a letter, whereof a copy is hereto annexed, marked H, and the original whereof he charges, on his belief, was received by the said company on the fifth day of July, one thousand eight hundred and fifty-three.

36 And your orator further shows that the whole of the foregoing matters, and the claims of your orator against the said South Fork Canal Company, and the fraud attempted on him by the said defendants, besides being matters of public notoriety in Placerville and in San Francisco, were made public from time to time by your orator in divers places, advertisements, and printed notices published by your orator, and, as he verily believes, all of the defendants in this suit had notice thereof immediately after your orator became aware of said several matters respectively.

Your orator further shows that the said South Fork Canal Company afterwards, to wit, on or about the twenty-second day of August, one thousand eight hundred and fifty-three, for the purpose of raising some money to complete said canal, executed a mortgage on the whole of said canal, being the same premises covered by the said

37 lien of your orator, to Edward W. Church and Charles de Ro, of San Francisco, both of whom were directors of said company at the time said Kinyon executed the release aforesaid, (as trustees,) for the purpose of securing obligations or notes of said company, to the amount of two hundred and fifty thousand dollars, in sums as follows, to wit, one hundred notes of three hundred dollars each, one hundred of five hundred dollars each, and one hundred and seventy of one thousand dollars each, which obligations or some of them the said company have since negotiated and put in circulation, and many of which are now outstanding, and are passed about from hand to hand as personal property, and are now owned by various individuals to your orator unknown, for all which note-holders the said Edward W. Church and Charles de Ro are trustees, and the said de Ro and Church, on their behalf, now allege and pre-

38 tend that the lien of the said mortgage to them is a prior lien to that of your orator on the said canal, and that they hold a lien on said premises for the amount of said obligations or notes free and discharged of all claims of your orator in the premises.

And your orator further shows that said South Fork Canal Company have, since the first day of July, one thousand eight hundred and fifty-three aforesaid, confessed voluntarily two judgments, one in the district court of the fourth judicial district of the State of California, for the sum of eighteen thousand five hundred and thirty-seven dollars $\frac{}{100}$ to Benjamin F. Moulton, of San Francisco, who was agent for and a stockholder in said company on the twenty-eighth day of June, one thousand eight hundred and fifty-three aforesaid, and the other, in the county of Eldorado, in the district

court of the eleventh judicial district of the said State, for the sum of fourteen thousand four hundred and ninety-nine dollars $\frac{12}{100}$ in favor of Ralph Reynolds, sen'r, and Ralph Reynolds, jun'r, copartners in business, the latter of whom was a stockholder and director and interested in said company on the said twenty-eighth day of June aforesaid, and one of the directors who personally conspired to defraud your orator by negotiating with said Kinyon for the release aforesaid, which said judgments your orator charges have been assigned to the defendants John A. Read, Daniel T. Lisle, and John Kirk, also stockholders in said company and interested therein, and under which judgments, on or about the eighth day of May, one thousand eight hundred and fifty-four, at Coloma, in Eldorado county aforesaid, the said canal was sold by the sheriff of said county, and has been purchased, as your orator charges on his information and belief, either by or on behalf of said defendants John A. Reed, Daniel T. Lisle, and John Kirk, and D. K. Newell, or some of them, for the purpose of defrauding your orator of his just claims and demands.

And your orator further shows that, during the period of time covered by the various transactions herein detailed, the defendants Benjamin T. Keane, William H. Smith, A. T. Taylor, John Buchanan, Dr. Stanly T. Childs, Obed Harney, Ralph Reynolds, jr, Andrew T. Binney, D. K. Newell, C. C. Batterman, Charles de Ro, and Edward W. Church, were officers or stockholders of the said corporation, the said Benjamin F. Keane being president thereof, and the said William H. Smith, a director thereof, the said A. T. Taylor, secretary thereof, and afterwards a director thereof, the said John Buchanan, a director thereof, the said Doctor Stanly F. Childs, a director thereof, the said Obed Harney, a director thereof, the said Ralph Reynolds, jr., a director thereof, the said A. T. Binney, chief engineer thereof, the said D. K. Newell, the agent, general adviser, and an influential stockholder thereof, and the said C. C. Batterman, secretary thereof, and that without the discovery hereinafter prayed from the said last-mentioned defendants, it will be impossible for your orator to prove the various facts and circumstances as heretofore stated and set forth; and your orator well hoped that the said South Fork Canal Company would have paid to your orator the said sums of money due to him as heretofore set forth, or that the defendants would otherwise have done justice to your orator in the premises, as they in equity and good conscience ought to have done. But now so it is, may it please your honor, that the said defendants combining and confederating together and with divers other persons at present unknown to your orator, but whose names, when discovered, your orator prays may be herein inserted, with proper and apt words to charge them in the premises and make them parties hereto, and combining how to injure and aggrieve your orator in the premises, wholly neglect and refuse to make such payments, or to set aside and cancel the said release of the said Kinyon, or to acknowledge the priority of the lien of your orator over the said mortgage so executed to the said defendants

Charles de Ro and Edward W. Church, and the title acquired by the said defendant's Kirk, Lisle, and Reed, and Newell, or otherwise to do justice or right to your orator in the premises, as they in equity and good conscience ought to do; for reason whereof the said defendants set up and allege a variety of false and unfounded pretences,

and sometimes the said defendants allege and pretend that
43 the said Kinyon and your orator were general partners, and authorized as such to act for and bind one another, and that the said South Fork Canal Company originally contracted with them as such; whereas, on the contrary, your orator charges, that the said Kinyon was not in any way connected with your orator until he and the said Kinyon bid for the contract for building that part of the said canal afterwards contracted for by said Kinyon and your orator, and that he was then introduced to your orator by the defendant A. T. Binney by a written note of introduction recommending him to your orator as a suitable person to enter into such contract, jointly with your orator; and it was in the strength of the said introduction and the opinion which your orator formed of the said Kinyon's business qualifications,

after being introduced to him, that your orator was induced to
44 take the said contract jointly with said Kinyon, and that the arrangement which he did make with the said Kinyon was not of a partnership of any kind, but is correctly set forth in the agreement, a copy of which is hereto annexed, marked I, and that the said defendants were severally aware of the foregoing facts, of the character of the said contract between your orator and the said Kinyon, before the execution of the said contract with said company by your orator and said Kinyon, and that in fact the said defendants were well aware that the said Kinyon was a man of no means or responsibility, and that he had previously been a contractor with the said company for the performance of other work and had been unable to fulfil his said contracts for want of means, and that his tools had been

attached and subjected to legal process for debts; and the said
45 defendants or some of them had, for the sake of enabling him to go on with the work of said company, advanced funds or become responsible for the engagements of said Kinyon, and that the said facts will appear, if such of the said defendants as are thereto interrogated shall set forth when, where, and how they became acquainted with the said Kinyon, and what means, capital, or property he possessed to the knowledge of them, or either of them, fully and particularly at the time of entering into the said contract with the said company jointly with your orator, and what previous contract dealings or transactions he had previously with the said company, or the said defendants, or any of them, and whether he performed such contracts or engagements, or failed in any, and what manner, to perform the same, or any, and what part theref, and how par-
46 ticularly, and the cause or alleged cause of such failure, and whether the tools or other property of the said Kinyon had not before the time of entering into the said contract jointly with your orator been attached, or seized, or levied on, and when and by whom and for what claims, and for what amount, and how the same were

released from said attachment, seizure, or levy, and when and how the aforesaid defendants learned of the connexion between your orator and the said Kinyon, and the information which they or any of them possessed respecting the same, and why they exacted from your orator a sworn statement of his property and means as hereinbefore stated, and dispensed with the same from the said Kinyon.

And sometimes the said defendants, or some of them, allege and pretend that the said South Fork Canal Company had not, prior to the recision of the said contract on the seventh day of June,
47 one thousand eight hundred and fifty three, broken said contract, and that the said company had furnished said grades and levels as far and as fast as called for by the said Kinyon and your orator, and that your orator and the said Kinyon had waived the furnishing of said grades and levels, and that the failure of said company to furnish said grades was no damage to your orator and the said Kinyon; the contrary of all which your orator charges to be the fact, and that the same will appear if the said defendants, or such of them as are hereinafter thereto interrogated, shall set forth and discover who was or who were the engineer or engineers who were authorized furnish said grades and levels, and when and at whose request they furnished the same, and the manner of doing so, at whose request the same was done, and when such request was made, and whether verbally or in writing,
48 and the particulars thereof, and when the furnishing thereof was commenced, when completed, and how in particular such alleged waiver was made, and when and by whom personally, and whether verbally or in writing, and the particulars thereof, and what were the ordinary wages of laborers and of carpenters on the eighteenth day of March, one thousand eight hundred and fifty-three, on the seventeenth day of April, one thousond eight hundred and fifty-three, on the first day of May, one thousand eight hundred and fifty-three, and on the sixth and seventh of June, one thousand eight hundred and fifty-three; with what facilities laborers and machanics of said classes could have been obtained at or near the proposed line of said canal at said periods, respectively. And your orator charges that the said alleged waiver by him and the said Kinyon, of the obligation to furnish said grades, could not in any event be deemed more than a con-
49 sent to the extension of the time for the furnishing thereof, but that the additional expense occasioned in the doing of said work by the failure to furnish the same as called for by said contract should, notwithstanding, be borne by the said company. And sometimes the said defendants, or some of them, allege and pretend that the said contract was taken by your orator and the said Kinyon at prices which would have left no actual profit to them, and the performance and completion of the work therein provided for, and that the breaches of said contract by the said company hereinbefore set forth did not in fact occasion any loss or damage to your orator and the said Kinyon; the contrary whereof your orator charges to be the truth, and that said contract would have been highly profitable to your orator and the said Kinyon, if the same had been performed and

kept by the said company on their part, and by your orator
50 and the said Kinyon on their , and that the same will appear if the defendants, or such of them as are thereto interrogated, shall set forth and discover the estimates made by them, or any of them, of the amount of work and labor and materials of every kind and description required to fulfil the said contract, and the aggregate sum which would have had to be paid by the said company for the full and complete performance and finishing thereof by your orator and the said Kinyon, and the other matters in that behalf hereinafter interrogated. And sometimes the said defendants, or some of them, allege and pretend that after the making of the said second estimate of the fourth of June, hereinbefore mentioned, the said South Fork Canal Company, through its officers or agents, tendered to your orator and the said Kinyon the sum of eleven
51 thousand seven hundred dollars, being eighty per cent. of the amount thereof, and that the said Kinyon and your orator refused to receive or accept the same; which pretext your orator charges to be untrue, and that no such tender or offer was ever made to him, and that if any such offer or any offer of like nature was ever made to the said Kinyon the same was not made until after said contract had been rescinded, and then not made unconditionally, but was coupled with a condition that the said Kinyon should withdraw or cancel the said letter of the seventh day of June annulling said contract, or with some other condition; that the said tender, if ever made to the said Kinyon, was made at an unusual time and place, being late at night, after the said Kinyon had gone to bed, and at the bedside of said Kinyon; but that, nevertheless, said Kinyon offered to receive any money they would pay; that the said tender
52 was never made in good faith or intended to be actually complied with, and that the same will fully appear if the said defendants, or such of them as are thereto hereinafter interrogated, shall set forth and discover the full and exact particulars of said alleged tender or offer, and of all the circumstances attending the same, as hereinafter specially interrogated and inquired of. And sometimes the said defendants allege and pretend that the said release was given by the said Kinyon and received by the said company in good faith, and in fact that the same was given for an adequate and valuable consideration, enuring to the benefit of your orator and the said Kinyon; and that the said company had not, nor had the officers thereof, any knowledge or notice of the want of authority of the said Kinyon to execute the same on behalf of cr so as to bind your orator,
53 and that in fact the consideration thereof, besides the said five thousand dollars, payable as hereinbefore mentioned, was the release by the said company of a large and valid claim by and in favor of the said company against your orator and the said Kinyon for damages for the non-performance of the said contract to build the aforesaid sections of the said canal by them, in accordance with its terms, and for a forfeiture of the penalty of the aforesaid penal bond given for the faithful performance thereof; which allegation and pretext your orator charges to be grossly false in all its parts, and that

the same will appear if the said defendants, or such of them as are thereto interrogated, shall answer and discover the matters hereinbefore set forth, and herein specially charged and interrogated to, and especially the full, minute, and exact particulars of all the negotiations leading to or which resulted in the giving of said release,
54 and the exact time, place, and circumstances, and full particulars of each and every step taken by the said defendants, or any of them, or the said Kinyon therein, or by any other person or persons therein, to the knowledge, information, or belief of the said defendants or any of them, and who particularly was made or became aware of each and every of said steps or transactions, and when, and how particularly, and whether the same was not all conducted in a private, secret, or clandestine manner; and if not, to whom, and when and how, was the same, or any and what part thereof, communicated or made known, and when, and where, and how, and by whom personally, the said consideration was paid or delivered over, and what disposition the said Kinyon made of the money he received as part of said consideration between the time of receiving the same and of his departure from Placerville, and why, and the exact time when, the said Kinyon received back said money, and to whom the
55 three thousand dollars of stock in said company was issued; and if not to said Kinyon himself, to what other party; and when the said defendants, or any of them, first declared to any person not interested in the said company (and to whom) the fact that such release had been given; and whether they, or some of them, or some one on the behalf or at the request of them, or some of them, did not make or cause to be made public announcements of the execution and delivery of such release, after the said Kinyon had left Placerville for San Francisco, and when it was too late for the intelligence thereof to reach your orator before the departure of the said steamer for San Juan del Sud; and why such announcement was made, and why it was not made earlier, and how it was made, and by whom; whether verbally, in writing, or by printed pla-
56 cards distributed or posted through the country; and if the latter, where printed, and by whom and when; and whether the affairs and pecuniary condition and prospects and probable success of the said South Fork Canal Company, and the controversy existing between it and the said Kinyon and your orator, were not at and before the said time subjects of general public notoriety and general or frequent conversation in Placerville, so that if the giving of said release had been publicly made known or had not been kept secret at Placerville until a late hour on the day of the twenty-ninth of June, the intelligence thereof would probably have reached your orator before the actual departure of said Kinyon for the Atlantic States, as hereinbefore set forth; and the other matters hereinafter more particularly inquired of in reference to all the said premises. And your orator further charges that the said defendants, or some of
57 them, have in their possession divers books, papers, letters, or documents relating to the said premises or some part thereof, or wherein or whereupon there are entries, notes, or memoranda re-

lating thereto, and from which, if produced and discovered, the truth of the foregoing matters, or some of them, would appear; and of all of which your orator prays a full discovery and disclosure.

All which actings, doings, and pretences of the said defendants are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator. And for as much as your orator is remediless in the premises at and by the strict rules of the common law, and cannot have adequate relief in the premises save in this honorable court, where matters of this and the like nature are properly cognizable and relievable—

To the end, therefore, that the said defendants, the South
58 Fork Canal Company, Charles de Ro, Edward W. Church, Daniel T. Lisle, John N. Reed, John Kirk, and D. K. Newell, (who are made defendants in this suit for the purpose of obtaining relief against them by reason of their adverse interests,) may, if if they can show why your orator should not have the relief hereby prayed; and that the said defendant, the South Fork Canal Company, may, under its corporate seal, and the said defendants, Charles de Ro, Edward W. Church, Daniel T. Lisle, John N. Reed, John Kirk, and D. K. Newell, may, upon their several and respective corporal oaths, answer the premises; and that the said defendants, Benjamin T. Keene, William H. Smith, Obed Harney, Ralph Reynolds, jr., John Kirk, Andrew T. Binney, and N. T. Taylor, who are made defendants for the purpose of discovery only, may, upon their several and respective corporal oaths, and according to the best and ut-
59 most of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth as by the note hereunder written they are respectfully required to answer, that is to say: 1st. Whether the said plaintiff, in connexion with said Kinyon, did not enter into the said contract with the said company, as hereinbefore set forth? Whether the said plaintiff was not, at the time of executing and entering into the same, a civil engineer and contractor residing in the city of San Francisco? and whether at that time the said Kinyon possessed any considerable means or capital, and how much, other particulars thereof, or was competent to act as engineer, or take any other part in the execution and fulfilment of said contract than superintending the work and directing the laborers employed therein.

60 2d. Was not said Kinyon introduced to plaintiff by means of a note written by the defendant Binney? and did it not recommend said Kinyon to the plaintiff as a suitable person to enter into such a contract with the plaintiff? Did not the defendant Binney give to said Kinyon a letter representing him to the plaintiff as a contractor of good standing on said canal? Was the arrangement made by said plaintiff with the said Kinyon a copartnership? or is it not correctly set forth in the paper hereunto annexed, marked I? Were not the defendants, or some of them, or one of them, aware of the nature of the agreement between plaintiff and said Kinyon prior to the execution of said contract with the company by plaintiff and

said Kinyon? or when did they and each of them become aware of or receive notice of or reason to suspect the same? Did not the defendants, or some or one of them, prior to the execution of
61 said contract, know or believe that the said Kinyon was a man of no, or of very slight responsibility? Whether he had not previously been a contractor with the said company for the performance of other, and what other work? and whether he had not, in fulfilling his contracts, or some or one of them, and, if so, which, failed to perform the same, or some, and what part thereof? or become indebted or liable to said company? and whether such result was not owing to his want of means? and whether his tools, or some of them, or other property, had not been attached or subjected to some, and what, legal process? and when and how particularly, and for what amount? and whether the defendants, or some or one of them, did not, for the purpose of discharging such process and enabling him to go on with the work of the said company or otherwise, advance funds or be-
62 come responsible for the engagements of said Kinyon? When were, and how did, the defendants, or any or either of them, first become, acquainted with said Kinyon? What means, or capital, or property did he possess to the knowledge of the defendants, or either of them, at the time that he entered into said contract jointly with the plaintiff? and whether he possessed any considerable means or resources at all? What previous contracts, dealings, or transactions had said Kinyon previously had with the said company, or with the said defendants, or either of them? and what indulgence or advances did he require, or were there made to him, and by whom, to enable him to fulfil them, or for any other and what purpose? In what claim or claims, and in whose behalf and for what amount, had the tools of said Kinyon been attached, or seized, or levied on? When was such attachment, seizure, or levy made? Was it not prior
63 to the making of the contract between the said company and said plaintiff and Kinyon? How, and by whom, and by what means, were such tools released from such attachment, seizure, or levy? When, and how, and from whom, did the defendants, or any or either of them, learn of the connexion between said Kinyon and the plaintiff, and what information did they derive, and from whom, respecting the same? Whether the defendants, or some or one, and which of them, were or was not aware, at or prior to the time of entering into said contract between the said company and the said Gordon and Kinyon, or prior to the execution or delivery by said Kinyon of said release, that the agreement between said Gordon and Kinyon was that said Gordon should be entitled to interest on his capital employed in said work at the rate of four per cent. per month, and to two-thirds of all the gains and profits and ad-
64 vantages to be derived from the performance of said contract, and the said Kinyon to one-third thereof? or of some other, and what, particulars of said contract? Were not the defendants, or some or one, and which of them, aware of the existence of the above terms and stipulations, or some or one of them, or some part thereof,

or of some terms providing for interest on the capital employed, or for a division of profits in unequal proportions?

3d. Whether the said company and its officers, or some or one of them, did not require the plaintiff and said Kinyon to execute and deliver to said company their obligation in the penal sum of fifty thousand dollars, as hereinbefore set forth, and whether the same was not executed and delivered? whether the said officers, or some or one of them, did not require that the plaintiff should make out to the value of his means and property, and submit to an examination on oath in respect thereto? and whether the plaintiff did not make such oath and submit to such examination, and why such examination and oath were required from your orator? whether any such oath or examination was exacted from said Kinyon? and if so, set forth a copy of the same; and if not, why not?

65

4th. Who was or were the engineers who were authorized to furnish the grades and levels specified in the contract between the said company and the said Gordon and Kinyon? When and at whose request did they furnish the same, and each and every part and parcel thereof, and how, and in what manner, at whose request were said grades and levels furnished when such requests were made? Were the same verbal or in writing? What were the particulars of such requests? When was the furnishing of said grades and levels commenced, and when was it completed? Did not plaintiff and said Kinyon, on or about the 18th, 19th, and 20th of March, 1853, and when particularly, address to the defendants, or some, and which of them a letter demanding the grades and levels? and state particularly the contents of said letter, and when and by whom the same was received. Did they or not, on or about the 23d of March, address to said defendants the original of the letter marked J. and hereto annexed; and on or about the 6th of April, another letter, a copy of which, marked K, is hereto annexed? In what particular manner, or by what means, was any alleged waiver made by the plaintiff and said Kinyon or either of them, of their or his rights to request such grades and levels to be furnished? Who personally made such alleged waiver? and how, particularly? Was it verbal or in writing?

66

5th. What were the ordinary wages at Placerville of laborers and of carpenters at the following dates: eighteenth of March, one thousand eight hundred and fifty-three, twenty-third of March, one thousand eight hundred and fifty-three, seventeenth of April, one thousand eight hundred and fifty three, first of May, one thousand eight hundred and fifty-three, sixth and seventh of June, one thousand eight hundred and fifty-three? and with what comparative facility could laborers and mechanics of the two classes just named have been obtained at Placerville at the periods respectively?

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6th. Did the defendants, or any or either, and which of them make any and what estimate or estimates of the amount of work, labor, and materials of every kind and description, or of any and what particular part thereof, required to fulfil the said contract, and the aggregate sum which would have had to be paid by the said company for the

full and complete performance of the same by the plaintiff and
68 said Kinyon? If so what was such estimate? and set forth the full particulars thereof.

7th. If the defendants shall allege that any offer or tender of eleven thousand seven hundred dollars or any other sum was ever made by the defendants, or any of them, to the said Kinyon and said plaintiff, or either of them, then set forth when and where, and to whom and by whom, individually, was such offer or tender made, with all the details and circumstances thereof. Was the same unconditional or coupled with any and what conditions, and who was present when the same was made? At what day and what time of day was it made, and where was said Kinyon at that time? Had he not retired to bed, and was he not in bed at the time, and how otherwise occupied? Was not such alleged tender made after the receipt by the defendants, or some, or one, and which of them of the letter of the
69 plaintiff of the seventh of June, one thousand eight hundred and fifty-three, hereto annexed, marked B? If such tender or offer was unconditional, why was it not accepted by said Kinyon? And what reason did he assign for refusing it? Whether said Kinyon did not offer to receive any money the defendants or any of them would pay him. Was said tender made in coin? Did the party making it have the coin present with him? If so, whence did he obtain it, and from whom, and on what conditions? At whose suggestion, or by whose advice was such alleged tender made? and the full particulars of such advice.

8th. Whether he, plaintiff, did not on or about the seventh day of June, one thousand eight hundred and fifty-three, address to the said company the letter of which a copy, marked B, is hereunto annexed? and was not such letter received by said company, or some or
70 one, and which of the officers thereof, and when and to whom did he communicate the same or its contents? and where and how, particularly?

9th. Whether the plaintiff and said Kinyon did not, after the said seventh day of June, one thousand eight hundred and fifty-three, continue the employment of a large number of laborers, about one hundred and fifty or one hundred and sixty in number, or of some, and if so, what number, for six days, and how long after the receipt of said letter by the said company, or some or one of the officers thereof, at the expense of said plaintiff, or otherwise, and how, particularly?

10th. Whether the plaintiff and said Kinyon stopped work on the the said canal on or about the thirteenth of June, one thousand eight hundred and fifty-three? and whether at that time the plaintiff and said Kinyon had not performed about one-half of the whole labor to be performed, and incurred one-half of the whole outlay
71 necessary for the completion of the whole of said work contracted for? and if not, what proportion thereof had been performed and incurred, fully and particularly?

11th. Whether, after the work under said contract had been entirely abandoned by your orator and the said Kinyon, and the workmen employed in the performance thereof had been disbanded as aforesaid,

and the plaintiff's connexion with the said Kinyon had entirely ceased, various or some negotiations were not had between the plaintiff and said company, aiming at a compromise of their difficulties? and whether in the course of such negotiations the plaintiff did not send to the said company, or some or one, and which, of the officers thereof the letter of the thirteenth of June, one thousand eight hundred and fifty-three, of which a copy, marked C, is hereunto annexed, or some other, and what particular communications, and whether said letter was not received by the president and directors of the said company, or some or one, and which, of them, on the thirteenth or four-
72 teenth of June, one thousand eight hundred and fifty-three or thereabouts, and when and whether the same or the contents, or tenor and effect thereof, was not made known to other, and which of the defendants, and how and when?

12th. Whether, on or about the same thirteenth of June, the plaintiff addressed to the president and directors of said company another letter, a copy whereof is hereunto annexed, marked D, and whether the original thereof was not duly received by the president and directors of said company, or some or one, and which, of them, on the fourteenth or fifteenth of June, one thousand eight hundred and fifty-three, and what disposition was made of it, and whether the same or the contents, purport, or tenor thereof was not communicated to the other defendants, or to some or one, and which, of them, and when and how?

13th Whether, on or about the fourteenth of June, one thousand eight hundred *eight hundred* and fifty-three, the plaintiff
73 did not address to the said president and directors, or some or one of them, another letter, a copy of which, marked E, is hereto annexed, and whether the same was not received by the president and directors of said company, or some or one, and which, of them, on or about the fifteenth of June, one thousand eight hundred and fifty-three, and whether the same or the contents, purport, or tenor thereof was not communicated to the other defendants, or to some or one, and which, of them, and when and how?

14th. Whether, from the thirteenth to the twenty-eighth of June, one thousand eight hundred and fifty-three, or on divers and what particular days and times between these dates, the said company was not engaged in negotiations with said Kinyon for the settlement of his individual interest, or some other and what interest, in the claim of the plaintiff and said Kinyon against said com-
74 pany; and whether some part of said negotiations was not conducted in writing on the part of said Kinyon, or some one on his behalf; if so, by whom, on the one part?—and the said company, its officers or agents, or some or one, and which of them, or some one in their behalf; if so, by whom, on the other part? Whether the same or a copy or copies thereof, or of some or some part thereof, are not now in the possession or under the control of the said company, or its officers or agents, or some or one, and which of them? If so, in whose possession or under whose control are the same, or any part and parcel thereof? and if not, where the same or any part thereof, or any

copy or copies thereof, are, or what has become of the same? What were the particulars of said negotiations? Set forth a copy or copies of such as are or were in writing and are or even were under the control or in the possession of the said company, its officers or agents, or any of them, or of the said defendants, or any of
75 them; and state the contents of such as are not in the possession or under the control of the company, its officers or agents, or some or one of them.

15th. Whether, on about the twenty-seventh or twenty-eighth of June, one thousand eight hundred and fifty-three, the defendants, or some or one of them, or some person or persons on their behalf, or the behalf of some or one, and which of them; and if so, who did not enter into negotiations with the said Kinyon? Whether the said Kinyon was not at the said last-mentioned period without money, destitute, or nearly so, of means and resources, and indebted or liable to the said company on one or more, and how many and what other, contracts which he had made with the said company; and whether alone or in connexion with some other and what person or persons for the erection of the Coon Hollow aqueduct, a portion of said South Fork canal, or some other and what work? Whether, during the
76 week prior to the said twenty-seventh of June, or thereabouts, the said Kinyon did not represent himself to the said defendants, or some or one, and which of them, as destitute of money, and borrow or ask to borrow of them or some of them a small and what sum of money, or solicit the same as a payment on account of his Coon Hollow contract, or as a loan or otherwise, to enable him to go to Sacramento or San Francisco, or for some other and what purpose? and the particulars thereof; and whether any of the negotiations for settlement with the said Kinyon embraced any proposals or stipulations relative to such other contracts or work, or the claims resulting or arising therefrom, and how particularly such claims were settled, or whether they or any, and which of them, were made instrumental, directly or indirectly, and how, particularly, in forwarding said negotiations with said Kinyon, or in effecting said settlement with him?

77 16th. Whether the said Kinyon did not in such negotiation first offer to sell to the said company or to the said defendants, or some or one, and which, of them, his interest in the said contract and profits thereon, or some distinct separate interest in or under said contract, for the sum of five thousand dollars, or some other, and if so, what sum? Whether said offer was or was not accepted or what reply was made thereto, and why? Whether the negotiations with said Kinyon for the purchase of the interest of said Kinyon or for the settlement of his claim, or the claim of your orator and the said Kinyon, or some part thereof, were not continued for two or three days? and if not, then for what period? and whether during that time or some portion thereof the said negotiations were not kept secret from the plaintiff and conducted in an entirely private manner, and why? or if otherwise, how otherwise? and whether during the pendence of di-

rectors of said company did not sit with closed doors or in secret session, and why? Whether it was their usual practice to hold their meetings in that manner? Whether they had ever, and if so, on what occasion, done so previous to the pendency of such negotiations? Whether during the pendency of said negotiations and during the sitting of the board of directors there was not an agreement or understanding, express or implied, among the members thereof, or some, and which, of them, that nothing of their proceedings in the premises should be divulged until said negotiations should be completed, or some similar agreement or understanding? and if so, what? Set forth who personally conducted said negotiations on each side, and the full and minute particulars thereof and of each proposition or offer made, and of the reply thereto and result thereof.

17th. Whether the said negotiations were not brought to a
79 close at about midnight on the twenty-eighth of June, one thousand eight hundred and fifty-three? and if not, when and at what hour of the day, and how and where and by whom, were they brought to a close? and whether the said Kinyon did not then agree for a bribe or consideration of five thousand dollars, or for the sum of two thousand dollars payable in cash and three thousand dollars payable in the stock of said company at par, or for some other, and what amount, price, or consideration payable in some other manner—if so, what amount and how payable?—to execute a release of all the said demands in favor of the plaintiff and himself against said company? Whether such release was not executed on the condition and agreement or with the understanding, express or implied, that the directors of the said company or the parties cognizant thereof should pre
serve the transaction entirely secret, or that the said trans-
80 action should be preserved entirely secret until the said Kinyon should have an opportunity of secretly leaving the State of California, or until some other and what time? or whether there was not some similar agreement or understanking between said Kinyon and the agents or officers of said company or of the said defendant, or some or one, and which, of them? and if so, set forth the same and all the particulars thereof.

18th. Where, when, and under what circumstances did the said Kinyon execute said release; whether it was not at or about midnight of the said twenty-eighth of June; or at what other time particularly, and who was present at the execution and delivery thereof, and what took place at such execution and delivery?

19th. Whether the original of said release is not now in the possession or under the control of the defendants, or some or one, and which, of them? If not, what has become of the same? If the
81 same is in the possession or under the control of the defendants, or any of them, set forth the same.

20th. Whether said release was not prepared by the defendant D. K. Newell? If not, then by whom, and at whose request or direction? Whether the said Newell was not at that or some other, and what, time largely or to some, and if so, to what, extent, and how particularly, interested in the said company as a stockholder or other-

wise, and how otherwise? Whether the said Kinyon was not persuaded and induced to execute the said release by the defendants Obed Harney, the said D. K. Newell, the said Andrew T. Binney, the said William H. Smith, and the said John Kirk, or some or one and which, of them? Whether the said Obed Harney was not at that, or some other and what, time one of the directors of said company? Whether the said D. K. Newell was not at that, or some other and what, time a stockholder in said company or the agent of
82 said company, or both? Whether the said Andrew T. Binney was not at that, or some other and what, time the chief engineer and director of, and also a large stockholder in, said company? Whether the said William H. Smith was not at that, or some other time, and what time, a director and stockholder in said company? and whether the said John Kirk was not at that, or some other and what, time a large stock or note holder of said company, and by which and what means, inducements, persuasions, or threats the said Kinyon was induced to execute the same, and by whom such inducements, persuasions, or threats were held out? Whether the said defendants, or some or one, and which, of them was or were not aware that in executing the same the said Kinyon was perpetrating a fraud on the plaintiff? Whether the defendants, or some or one, and which, of them, was or were not aware, or had notice or reason to be-
83 lieve, at the time of the execution of said release, that the said Kinyon had no right or authority to compromise the rights and claims of the plaintiff? and whether his right or authority in that behalf was not the subject of some, and what, conversation or discussion amongst them, or some and which of them? Whether any, and if so, what, inducement and persuasions were held out to said Kinyon by the defendants, or any one or more of them, and where and when, and under what circumstances, and by whom, fully and particularly, and in whose presence the said release was executed?

21st. Whether the sum of money, or consideration or bribe, agreed to be paid or paid by the defendants, or some or one of them, to said Kinyon for executing the said release, was not two thousand dollars in cash, and three thousand dollars in stock of the said South Fork Canal Company? and if not, whether any and what other or different con-
84 sideration was agreed to be paid or paid therefor? Whether said stock, or some portion, and if so, what portion, thereof was not entered in the books of the South Fork Canal Company in the name of Elizabeth Kinyon or E. Kinyon, or the name of some female, or some other name than that of the said Alonzo Kinyon, and whether such entry was not so made for the purpose of defrauding the plaintiff or protecting said stock from him, or concealing the said transaction; and if not, for what other purpose? At whose suggestion was such stock so issued or entered, and what reason was assigned therefor, and by whom? Did not the defendants, or some or one of them, suggest the same, or acquiesce therein? Whether the payment and issuance of said stock, and the delivery of said release, took place at Placer-
ville, in Eldorado county, and whether he was not then absent,
85 and in the city of San Francisco, the place of his residence?

Whether any notice was ever given to the plaintiff of any negotiations and proceedings connected with said release, while the same were pending or after their consummation? Whether the fact that said release had been obtained and executed, was not kept a secret at Placerville, until after eight o'clock in the morning of the thirtieth day of June, one thousand eight hundred and fifty-three? and whether the knowledge thereof was not restricted to the said company, its officers or agents? Did the defendants, or, any or any one, and which, of them, prior to the thirtieth day of June, one thousand eight hundred and fifty-three, disclose the fact of the execution of said release? and if so, to whom and under what circumstances, and under what injunctions or instruction, or under what understanding was the same disclosed? Whether the office of said company
86 was not situated at Placerville, and whether the affairs and pecuniary condition and probable success of said company, and its relations with the plaintiff, were not a subject of public notoriety, and of several conversations at Placerville, so that if the owners of said release had been made publicly known, or had not been kept secret at Placerville, until a late hour of the twenty-ninth of June, the intelligence thereof would probably have reched the plaintiff before the actual departure of the said Kinyon as aforesaid? Whether the execution of said release was not divulged by the defendants, or some or one, and which, of them, about noon on the thirtieth day of June, one thousand eight hundred and fifty-three, and if the same did not immediately, or almost immediately thereafter, become publicly known, and a general subject of conversation at Placerville? Set forth the full minutes and exact particulars of all the negotia-
87 tions leading to or which resulted in the giving of said release, and the exact time, place, circumstances, and full particulars of each and every step taken by the said defendants, or any and which of them, or by the said Kinyon, or by any other person or persons therein, to the knowledge, information, or belief of the said defendants, or any of them; and who, particularly, was made or became aware of each and every of said steps or transactions, and when and how, particularly, and to whom and when and how was the same, or any and what part thereof, communicated or made known, and when and where and how and by whom, personally, the said consideration was paid or delivered over; and what disposition the said Kinyon made of the money he received as part of said consideration, between the time of receiving the same and his departure from Placer-
88 ville, and why such disposition was made, and what reason was assigned therefor, at the exact time when said Kinyon received back said money after such disposition, and when the said defendants, or any and which of them, first disclosed or suffered or permitted to be disclosed to any person not interested in the said company, and to whom the fact that such release had been given, and whether the said defendants or some, and which, of them, or some one, and who, particularly, on the behalf or at the request of them, or some one, and which, of them, did not make or cause to be made public announcements of the execution and delivery of such

release after the said Kinyon had left Placerville, and when it was too late for the intelligence thereof to reach the plaintiff before the departure of the said steamer for San Juan del Sud; and why such announcement was made, and why it was not made earlier,
89 and how it was made, and by whom, and whether verbally or in writing, or by printed placards distributed or pasted through the country; and if the latter, when were the same printed, and by whom and at whose request, and when?

22d. On whose advice did said Kinyon so dispose of the money he so received? and why was such advice given? and when?

23d. Whether, at or about four o'clock in the morning of the twenty-ninth of June, one thousand eight hundred and fifty-three, or at what other hour, the said Kinyon did not clandestinely leave Placerville for San Francisco? and whether, on the first day of July, one thousand eight hundred and fifty-three, he did not secretly leave San Francisco in one of the steamers for the Atlantic States, unknown to the plaintiff, and without having disclosed to him his presence in the city of San Francisco, or his intention to leave the
90 State of California, or the execution of said release, and the circumstances connected therewith; and whether the said Kinyon has not since absented himself from this State?

24th. Whether, on or about the fourth day of July, one thousand eight hundred and fifty-three, the plaintiff did not despatch to the directors of said company or some and which of them, the letter of which a copy is hereunto annexed and marked H, and of which the original was received by the said company, or some or one of the officers or agents thereof, and which of them, and whether the same or the tenor, purport, or contents thereof, were not made known to the other defendants herein, or some or one, and which, of them, and when?

25th. Whether the claims of the plaintiff and the said Kinyon against said company, and their controversy with the said company, were not at the time of said Kinyon's departure as aforesaid,
91 and prior thereto, matters of public notoriety at Placerville and San Francisco? and whether they were not also made public by the plaintiff by means of divers placards, advertisements, and printed notices published by the plaintiff? and whether the same or some or one, and which, thereof, were not seen and read by the defendants, or some or one, and which, of them? and whether the defendants, or some or one, and which, of them had not notice of all the matters aforesaid, or of some, and what, particular part thereof, immediately, or almost immediately, or very shortly after the plaintiff became aware of the several matters herein stated, relative to the execution of said release, and the subsequent conduct of said Kinyon, and when, particularly?

26th. Whether the said South Fork Canal Company afterwards, and on or about the twenty-second of August, one thousand
92 eight hundred and fifty-three, did not execute a mortgage on the whole of said canal, for the purpose of raising money to complete the same, to Edward W. Church and Charles de Ro, of San

Francisco? Whether said Church and de Ro were not, at the time said Kinyon executed the said release, directors of said company, or in some other, and what, manner connected therewith or interested therein? Whether said mortgage was not executed on the same premises covered by the said lien of the said plaintiff, and was not executed for the purpose of securing obligations or notes of said company; if so, to what amount, and in what sums was such indebtedness payable?

27th. Whether the said de Ro and Church do not pretend that the lien of said mortgage to them is a prior lien to that of the plaintiff on the said canal, and that they hold a lien on said premises
93 for the amount of said bonds, free and discharged of all claims of the plaintiff in the premises?

28th. Whether the said South Fork Canal Company has not, since the first day of July, one thousand eight hundred and fifty-three, voluntarily confessed a judgment to Benjamin F. Moulton, of San Francisco, who was agent for and a stockholder in said company on the twenty-eighth of June, one thousand eight hundred and fifty-three? and if such judgment has been confessed, let the defendants set forth the date and amount thereof; whether the said company has not also voluntarily confessed a judgment to Ralph Reynolds, jr. and Ralph Reynolds, sr., copartners in business under the firm of Reynolds & Son? and whether said Ralph Reynolds, jr., was not also a stockholder, note holder, or director in said company on the said twenty-eighth of June, or at some time other, and what time? Whether said judgments have been assigned; if so, to whom and at
94 what time? Were such assignees stockholders, or note holders, or directors of said company, on or about said twenty-eighth of June, or at some other time, and when, particularly?

29th. Whether, under either or both of such judgments, the said canal has been sold, or any and what part thereof, or any and what interest therein? If so, when, and by what sheriff, and who purchased the same? Was not the same purchased on behalf of said judgment creditors or one of them, or the assignees of them or one of them, and who now holds the same?

30th. Set forth a list or schedule of all books, papers, letters, or documents of every kind which now are, or ever were, in the possession of the said defendants, or any of them, relating in any way to the matters in this bill, or in the several answers of the said defendants mentioned, and set forth or wherein or whereupon there is any note, memorandum, or writing of any kind relating to the mat-
95 ters aforesaid, or to any of them, which now are, or ever were, in the possession, power, or control of the said defendants, or any of them, and set forth in whose possession, and when, and where the same now are, or were when last seen, known, or heard of by the said defendants, or either of them, and as to all of the same which are not stated to be now in the possession or under the control of the said defendants, or any of them, state specifically what has become of the same, and each one thereof, and why the same was or were so disposed of.

And that all of said books, papers, and documents, when discovered, may be produced and deposited with the clerk of this court for the usual purposes, and that the several answers of the said defendants may be made with express reference as well to the times of the various transactions herein or therein stated as to the times of
96 filing this bill, and each of the said answers. And that the release executed by the said Kinyon may be set aside, and decreed and declared fraudulent and void, and of no effect as against your orator, and that the said South Fork Canal Company may be decreed to pay to your orator the various sums of money so due to him as hereinbefore stated and shown, as damages for the various breaches by them of the aforesaid contract, and for the amount due to your orator by said company for the work, labor, and materials aforesaid, and for the money paid, laid out, and expended by the plaintiff to and for the use of the said defendant, the said South Fork Canal Company, and that the plaintiff may be decreed to be entitled to interest at the rate of four per cent. per month on all the sums of money so advanced by him for the prosecution of said work
97 from and after the time of the execution of the aforesaid release by the said Kinyon, and that your orator may be decreed to have a lien upon the whole of the said South Fork canal for the full amount of the said several sums of money and interest thereon, and that such lien may be decreed and declared to be prior to the lien, estate, right, or title of any of the said defendants, and that the said South Fork canal may be sold to satisfy the aforesaid lien of your orator, and that the said South Fork Canal Company, its agents and officers, and all persons claiming by, through, or under it or them, may be perpetually enjoined and restrained from ever using said release, or setting up the same as a defence in any action or proceeding commenced, or to be commenced, against the said South Fork Canal Company, its agents or officers, by your orator, and for such further or other and further relief in the premises as may be agreeable
98 to equity and good conscience.

May it please the court to grant unto your orator the writ subpœna of the United States of America issuing out of and under the seal of this honorable court, directed to the said South Fork Canal Company, D. K. Newell, Benjamin T. Keene, William H. Smith, John Buchanan, Dr. Stanley F. Childs, Daniel T. Lisle, John A. Reed, C. C. Batterman, Obed Harney, Ralph Reynolds, jr., John Kirk, Andrew T. Binney, A. T. Taylor, Charles de Ro, and Edward W. Church, (your orator expressly waiving any process or decree against the said Alonzo Kinyon, who is without the jurisdiction of this court,) and the rest of the confederates, when discovered, thereby commanding them, and each of them, at a certain day and under a certain penalty therein to be specified, personally to be and appear before your honor in this honorable court, and then and there
99 to answer all and singular the premises, and also commanding the said defendants, the said South Fork Canal Company, Daniel T. Lisle, John A. Reed, John Kirk, Charles de Ro, and Edward W. Church, to stand to perform and abide such order and decree

therein as to your honor shall seem meet, and as shall be agreeable to equity and good conscience; and, your honor, will ever pray, &c.,

GEORGE GORDON.

JAMES T. BOYD, *Solicitor for Plaintiff.*
JOHN T. DOYLE, *of Counsel.*

NORTHERN DISTRICT OF CALIFORNIA, *ss:*

George Gordon, the plaintiff in the above bill of complaint named, being duly sworn, says that he has read the said bill of complaint by him subscribed, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on his information or belief; and as to those matters, that he
100 believes it to be true.

GEO. GORDON.

Sworn to before me this twelfth day of June, 1854.

J. J. PAPY, *U. S. Com'r.*

NOTE.—The defendant Benjamin J. Keene is required to answer the interrogations numbered 1, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 28, and 30.

The defendant William H. Smith is required to answer the interrogatories numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, and 30.

The defendant A. T. Taylor is required to answer the interrogatories numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, and 30.

The defendant John Buchanan is required to answer the interrogatories numbered 1, 2, 3, 4, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 25, and 30.

The defendant Stanley F. Childs is required to answer the interrogatories numbered, 1, 3, 4, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 25, and 30.

101 The defendant Obed Harney is required to answer the interrogatories numbered 2, 3, 4, 6, 7, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 25, and 30.

The defendant Ralph Reynolds, jr., is required to answer the interrogatories numbered 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 28, and 30.

The defendant Andrew T. Binney is requested to answer the interrogatories numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, and 30.

The defendants John Kirk, Daniel T. Lisle, and John A. Reed are severally required to answer the interrogatories numbered 14, 15, 16, 17, 18, 19, 20, 21, 22, 25, 28, 29, and 30.

The defendant D. K. Newell is required to answer the interrogatories numbered 2, 3, 4, 7, 8, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 28, 29, and 30.

102 The defendant C. C. Batterman is required to answer the interrogatories numbered 3, 4, 5, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 28, and 30.

The defendants Charles de Ro and Edward W. Church are severally required to answer the interrogatories numbered 26, 27, and 30.

103 *Schedule A.*

Articles of agreement made and concluded the sixteenth day of March, 1853, between Alonzo Kinyon and George Gordon of the one part, and the South Fork Canal Company, by their president, of the other part, whereby it is covenanted and agreed as follows, to wit:

The said Alonzo Kinyon and George Gordon hereby covenant and agree that they will furnish all the materials required, which shall be of a sound, durable, and good quality, and approved by the chief engineer in the employ of said company, and perform all labor necessary to construct and finish, in every respect in the most substantial and workmanlike manner, the portion of the flume or canal from section 17 to 25, inclusive, of the South Fork Canal.

The construction of said section to include all its appurte-
104 nances, and shall be in all respects according to the annexed specifications, which shall be considered a part of this contract. It is mutually agreed that said company shall furnish the right of way over said section of canal, but no claim for damages arising from delay that may in any case occur in obtaining such right shall be made by contractors. It is further agreed by the said contractors that the work hereby contracted to be done shall, as far as may be required by the engineer, be prosecuted so as facilitate and not incommode the prosecution of contracts for adjoining or contiguous works, and the manner of terminating the work at the ends of the section contracted for shall be according to the directions of said engineer. It is further agreed that this contract, in every respect, shall be prosecuted in such order, and at such places and parts, and at such times, as the engineer may direct. It is further agreed that if
105 any material brought on for the use of the work shall be condemned by the engineer as unsuitable for the same, the contractor shall forthwith remove such materials entirely away from the line of the work, as the engineer may direct, so as to effectually guard against their introduction into the same. And it is further agreed that if at any time any workman or overseers employed by said contractors shall be unfaithful, incompetent, or shall have made exertions to produce disturbances on this or any other section of the canal, the contractors shall, on being required by the engineer, forthwith discharge such person, and not employ him upon the work, nor shall the contractors employ any person who may have been dismissed for similar cause on any part of the work. And the said contractors further agree that any alteration in the form, dimensions, or
106 material of said work which may be directed by the engineer shall be made as directed, and if in the opinion of the engineer it will be deemed expedient to dispense with the whole or any part of the work hereby contracted for, the contractors, on receiving

directions, shall discontinue any arrangements or progress on work so directed to be dispensed with. But the contractors shall be entitled to such compensation as said engineer may deem just and reasonable for any outlay they may have made for work so dispensed with, but no allowance or claim shall be made for anticipated profits on such work. It is further agreed that should any change of location of the canal render the work more or less expensive in kind, the contractors shall be entitled to such extra compensation, or such deduction shall be made in the price of the work, as the engineer may deem just and equitable. To prevent disputes, it is hereby
107 mutually agreed that the engineer shall in all cases decide every question which can or may arise relative to the execution of this contract on the part of the contractors, and his estimate or decision shall be final and conclusive. It is further agreed that when the work shall be increased by the enlargement of any portion, or by any contingent work which the engineer may deem necessary beyond what is contemplated in this contract, or entitled to extra pay by any provisions of the same, such increase or contingent work shall be paid for at the same rate as similar work herein contracted for, or if not similar to work herein contracted for, it may be paid for as an extra item, agreeably to the estimate of the engineer, or it may be made subject to a new contract, at the discretion of the engineer.

108 And the company hereby engage that whenever this contract shall have been wholly completed on the part of the contractors, and the engineer shall have certified the same, they will pay for said work as follows:

Preparation of bearings for trestle-work, at engineer's estimate.

Clearing and grubbing, three hundred dollars for each section.

Excavation of earth, fifty cents (50 c.) per cubic yard.

Excavation of hard pan, including slate rock, one dollar and forty cents ($1 40) per cubic yard.

Excavation of rock, six dollars ($6) per cubic yard.

Heavy timber, forty cents (40 c.) p'r lineal foot.

Light timber, thirteen cents (13 c.) per lineal foot.

Spikes and nails, thirty cents (30 cts.) per pound.

Plank, one hundred and five dollars ($105) per thousand feet, board measure.

The prices above specified are to be in full compensation for
109 all the materials and labor required to put the same in the work, and complete the same in all respects as provided for in this contract.

In order to enable the contractor to prosecute the work advantageously the engineer shall make an estimate not oftener than once in each month, as the work progresses, of the work done, and its relative value under this contract. The said estimate shall not be required to be made by strict measurement or unfinished work, but by measurement so as to obtain an approximate result of the work done; but it shall not be required of the engineer to measure at all for work that is in an irregular form, but may estimate on his judgment of the

same; and it is specially understood that estimates shall be made only when the work is prosecuted agreeably to the provisions of this contract and with such progress as is satisfactory to the engineer.

110 The company will pay in current coin of the United States within twenty per cent. of the amount of such estimate on presentation. And it is further agreed that if, in the opinion of the engineer, the contractors shall neglect or refuse to prosecute the work embraced in this contract with sufficient energy to insure its completion within the time specified in the same, or violate any of its provisions, or perform the work in an improper manner, the engineer may certify the same to the board of trustees of said company; and thereupon the trustees may declare the said contract abandoned by the contractors and may proceed to contract for the work with any other person. On the abandonment of this contract as aforesaid, the contractors shall forfeit to the said company any moneys that may remain due and unpaid at the time. And the said contractors

111 herein agree that the work herein contracted for shall be commenced within fifteen days after being required by the engineer, and that this contract shall be fully completed on their part by the first day of July, eighteen hundred and fifty-three. And it is further agreed that whenever this contract shall be completely performed on the part of the contractors, and the engineer shall certify the same in writing under his hand, with his estimate as aforesaid, the company shall, within ten days after the receipt of such certificate, pay to the contractors in current coin of the United States, the sum which, according to this contract, shall be due. It is further agreed that in the case of the absence or inability to act of the said chief engineer, then the assistant engineer in charge of the work shall have, and is hereby vested with, all the power given to the chief engineer in the premises; and his being a stockholder in

112 the company shall be no objection to his exercising all the powers herein granted to him. And it is further agreed by the contractors that they will perform all the stipulations of this contract by themselves and workmen under their own immediate superintendence, and not by sub-contract in any case whatever. It is further agreed that no charge for any extra work can be made by the contractors, unless presented monthly; and all work done and material furnished under this contract, after the same is erected to and becomes part of the work, shall be considered as accepted by the company, unless the same is objected to specifically within one week after its being incorporated into and becoming part of said work. It is further agreed that the grades and levels for the above work shall be furnished by the engineer of the company as fast and as fre-

113 quently as the contractors shall require the same. And it is further agreed, should any moneys due on this contract not be paid when due, such amounts shall bear interest until paid, at the current market rates for money at the time of such non-payment.

(Signed) GEORGE GORDON.
A. KENYON.
W. H. SMITH, *Pres. pro tem.*
A. T. TAYLOR, *Sec. S. F. C. Co.*

Specifications of the manner of constructing the South Fork canal.

Clearing and grubbing.—From the whole space for the canal, all trees, stumps, roots, brush and logs, and all trees standing outside of the line of the canal, which by falling after it shall have been completed, might break or injure the work, shall be cut down and removed.

114 *Excavating.*—For the flume, in earth or soft rock, cutting shall be a rectangular notch cut into the side of the ridge, of six feet level base, to be finished in an even and smooth manner, the material excavated to be placed on the lower side of the cutting, as directed. The pits for foundation for mechanical structures to be excavated in such forms, depths, and dimensions as shall be laid out, and the material excavated deposited as directed by the engineer. Where the line passes ledges of rock requiring to be blasted, only sufficient excavation shall be made to afford a proper foundation for an upright and horizontal cap. Loose boulders requiring to be removed, exceeding six cubic yards in dimensions, to be considered as rock excavation; and all material excavated to be considered the property of the company.

115 *Trestles.*—In rock cutting, the flume to be supported by trestles placed at intervals of 14 feet, each trestle to consist of an upright on which shall be mortised and pinned a horizontal cap 6 feet in length, and to be braced by a brace 3 feet run, mortised into cap and upright; the foot of the upright, as also one end of the cap to rest firmly on rock prepared to receive them. On this horizontal cap are to be placed two longitudinal string-pieces, notched down each two inches, on which the sills of the flume will be supported. All frame joints of the trestle work or flume to be boxed down as required.

The flume.—Where a rectangular notch has been cut it will be supported on sills 4 x 5, and 6 feet long, placed 3½ feet apart from centre to centre, and laid into the earth with their tops hewed, and at an even grade, every third sill to be 8 feet in length, from which to trace the flume. On those sills will be placed uprights 3 feet long

116 in the clear, across the upper ends of which is to be fastened a cap, the whole to be secured by mortise and tenon and pinned; all the timber necessary to the construction of the work to consist of the best quality of pine or cedar timber throughout. The planking of the flume will be required of the best quality clear pine, free from shakes, 1¼ inches thick, with open joints on the inside and closely fitting on the outside. The flume, when planked, to be 4 feet wide in the clear and 2¾ in height; the whole to be completed in the most substantial and workmanlike manner. For a more perfect description of the form and dimensions of materials and parts, and the manner of constructing the work in all its details, plans and bills of materials will be furnished.

General provisions.—The engineer will give such directions, from time to time, during the progress of the work, as may appear

117 to him necessary and proper, in order to make the whole work perfect and complete in all respects; and said plans, bills, and

directions shall, in every respect, be complied with, and the work subject to the constant supervision, inspection, and acceptance of the engineer, who shall be the sole judge of the quality and quantity of work done, and his decision and admeasurement of the same shall be final and conclusive between the parties.

The engineer reserves the right of altering the location, changing the dimensions, or moving the section stakes of any section at any time before the commencement or during the progress of the work. Should the location be changed after the commencement of the section, the contract for the part changed shall be null and void, and the contractor entitled to full pay, at cost prices, for all work done on such part of sect.; but if changed before the work is com-
118 menced on the section, the contractor shall be entitled to no claim of damage. The work shall be commenced within five days after the contractor shall have been notified that the work is ready, and finished by the first day of July, 1853. Contractors will be held accountable for all damages done or occasioned by their operations in performing the work under their contract.

Payments.—Eighty per cent. of the relative value of all work performed on each section, agreeable to these specifications, to be estimated in quantity and value by the engineer, will be paid monthly, and twenty per cent. will be retained as a security for the faithful performance of the contract. In all cases where firms or companies propose for work, the name of each person composing the firm shall be signed at length to those specifications as well as to the contract; but in cases of receipts for moneys paid for work done, the title of the firm, signed by one of the members thereof, shall be bind-
119 ing and obligatory on such firm or company.

No proposal will be considered unless in conformity with these specifications.

By order of board of trustees.

(Signed) ANDREW J. BINNEY, *Chief Engineer.*

Bond.

We, the undersigned, Alonzo Kenyon and Geo. Gordon, are held and firmly bound unto the South Fork Canal Company in the just and full sum of fifty thousand dollars, ($50,000,) the payment of which well and truly to be made of our respective estates.

The condition of the above obligation is such that whereas the above bound Alonzo Kenyon and Geo. Gordon have, for and in consideration of the estimated amount of one hundred and seventy-four thousand four hundred and sixty-five dollars, ($175,465,) more or less, to be paid by the South Fork Canal Company, as per contract
120 of even date herewith, undertaken to construct the upper portion of the flume of the South Fork canal from section seventeen to section twenty-five, both included, according to the specifications in the contract entered into between said parties concerning said sections:

Now, should the said parties above named as principals construct

the said work according to the specifications in said contract mentioned, to be approved of by the engineer, and complete the whole of the work included in said contract on or before the first day of July, A. D. 1853, this obligation to become void; but should said said parties fail to complete said work by the time specified, or should they do any of the same in an unworkmanlike manner, the engineer of the company being the judge of the same, then the undersigned are bound to the South Fork Canal Company for all the damages they may sustain thereby of every description whatever, and should there be a delay in the completion of the work above specified be-
121 yond the time allowed, the amount of the damages shall be the value of the water had the same be completed and the company selling the same; should the work be done in an unworkmanlike manner, the amount of the damages for the same shall be the difference between its value in that condition, and its value if completed according to the terms of the contract, the engineer of the company being the judge to ascertain the difference in value.

In testimony whereof, we have hereunto signed our names this 16th day of March, A. D. 1853.

(Signed) GEO. GORDON.
A. KENYON.

122 *Schedule B.*

PLACERVILLE, *June* 7, 1853.

To the directors and officers of the South Fork Canal Co.:

GENTLEMEN: By the terms of our *our* contract with you, we were to be paid eighty per cent. of the value of the work done under that contract monthly.

We have presented our bill on the 7th June for the work done in May, and the amount has not been paid. We now beg to give notice that the condition of the contract not having been complied with on this, its most important particular, we declare it annulled and at an end, and are no longer parties thereto.

In making this announcement, we beg to acknowledge our obliga-
123 tions to the directors and officers of the company for their personal kindness, attention, and courtesy. We wish to acknowledge this in the strongest terms; it is impossible to desire more personal consideration.

We wish also to say that we feel attached to and greatly interested in the noble enterprise which they direct, and more especially feel pride in our contract from the very difficulty of its execution and its importance relatively to the whole work.

Actuated by these motives, we wish in a frank, and we trust in a considerate manner, to say:

1st. That this communication is strictly confidential, one person only (John Hume, esq.) besides ourselves, being cognizant of it until it reaches your hand.

2d. That we will for six days longer from this date continue the work undertaken by us, at our own risk, and shall not ask for pay

beyond this date, unless the company choose, from their own
124 sense of honor, to pay us, and this for the purpose of allowing the company to make other arrangements without interrupting the work; and—

3dly. Although this abrupt termination of our contract will involve to us a loss of $40,000 expended in machinery, wages, and for general purposes, we shall claim no damages, but leave the settlement to the company's sense of right and justice, asking payment only for the work done to the evening of the 7th.

We simply terminate the contract from the fear that the company will allow us to make excessive expenditures, and then leave us embarrassed by their want of punctuality in payment.

We value this work; we value the profits of our contract; but our credit is still more valuable to us, and this to-day has been jeopardized and injured by the company's inability to pay us, and our
125 consequent inability to pay our men, to whom we had, assembled by public notice, announced our readiness to make all payments due to them on this day.

We have expended of our own resources on this contract $37,770. We remain at this date indebted on this work to others to the extent of $29,000 more.

We have, in the face of the great physical difficulties of the work and embarrassed by the bad credit of the company amongst workmen, completed a large and spirited amount of preparation and of actual work. This is acknowledged by all who have visited our work.

But the company cannot expect two private persons to be at once the artisans and the paymasters of a large work, and to bear the financial burdens which a company of some hundreds of stockholders contracted to bear. We, therefore, respectfully, but firmly
126 decline our contract to avoid embarrassment and discredit to ourselves, and at the end of six days shall discontinue the work, unless a new and secure financial arrangement be made, satisfactory to us, or such as your own directors, Mr. Church and Mr. de Ro, will pronounce to be convenient, secure, and proper.

(Signed) GEO. GORDON & KENYON,
By GEO. GORDON.

127 *Schedule C.*

JUNE 13, 1853.

To the president and directors S. F. canal:

GENTLEMEN: In our letter to you of 7th June, delivered by Mr. Hume, I offered sundry advantages to you, such as a waiver of damages of amount of work done, was paid for, &c., continuing the work six days to give you opportunity to arrange with us or our men, in case you did not want the work interrupted. No action having been taken or answer given to that letter, and the six days having elapsed at 4 p. m. to-day, we beg to withdraw the whole of it except that part which declares our contract broken, nullified, and ended, and do withdraw it accordingly. The offers and declarations contained therein

were voluntary, and having met with no response, it is com-
128 petent for us to withdraw them, and leave our position exactly as though they had not been written. It is very desirable, if the directors wish to continue the work, that they should determine about the men. Our credit has received such a shock by our checks being dishonored, and our money delayed and refused, that we cannot possibly continue either to hire or feed them with means to pay them.

Your obd't serv't,

(Signed) GEO. GORDON.
Per GORDON & KENYON.

129 *Schedule D.*

SAN FRANCISCO, *June* 13, 1853.

To the president and directors of the South Fork canal:

GENTLEMEN: I am preparing a proposal to submit to Mr. de Ro and Mr. Church, and after getting their views, shall leave for Placerville probably to-morrow evening.

I find it impossible to continue this contract with the existing dubious appearances for payments.

I have gone nearly to the extent of $40,000 in preliminary works, mills, and machinery, tools, roads, slides, railroads, &c., and at this date 70,000 in cash would handsomely complete the work.

5 weeks work of the mills will deliver all your lumber and small timbers framed and ready to go up.

With the incoming emigration, you will procure abundance
130 of cheap labor, and you might let out to good foremen a mile each of the work, so as ready to finish it within those figures.

I am preparing a proposal by which I surrender to the company all my improvements, mills, tools, &c., they paying me $12,000 in cash, which they have in hand, and $8,000 in 14 days, and the balance of the work done and cash advanced in the company's 37 mortgage bonds properly secured and drawn.

The result of this arrangement would be, according to my figures, that the company would purchase my mills and complete their work for $165,000, or $10,000 less than my work alone is estimated at, and they would over and above have one of the best mill properties in the State, which, situated at the head of their works, would enable them to float down lumber and small timber for repairs, for branch, ditches, and for sale, while from their waste boards they could
131 make a watchman's walk from end to end of their canal.

I find that it is too much for me to do all the work, and all the financiering for the company; while I should be financially engaged down here, the work suffers up there; while I attend to the work, my perpetual draughts on my resources below derange my business, while over all my mind is racked by perpetual anxiety less the company should fail, as they have failed, to meet my requirements without giving me notice, and compel me again to suspend payments, at least for some days.

I know my position precisely. If I conduct the work under a renewed contract I must be paid fortnightly, and know before the fortnight commences where the money is to come from, and be made secure of prompt payment.

If the company insist on non-compromise measures, they will
132 find their credit in San Francisco damaged very greatly by our quarrel and suits; to the extent of $39,000 advances and 29,000 liabilities to men and people up country, I am committed. My capital I am willing you should use in the work; my profits in the work done I am equally willing should be at your service on your bonds properly secured, but nothing shall induce me to incur further responsibilities without such securities as probably the company would find it irksome to furnish. I trust the company will not take offence at my frank style. I feel quite decided on this matter, and when a man is decided, it is better to say plainly that, what he means and feels.

Your most ob't serv't,

(Signed) GEO. GORDON.

I write this letter personally, not having Mr. Kinyon present, but I have no doubt he will agree.

133 *Schedule E.*

SAN FRANCISCO, *June* 14, 1853.

To the president and directors of the South Fork Canal Co.:

GENTLEMEN: I wrote you yesterday morning that I had made a proposal for the compromise of our difficulties. The proposal meets the entire approval of Mr. de Ro, provided the figures be correct within $10,000. Mr. Church appears disinclined to have the company complete the contract, fearing it will cost more in their hands than in the hands of a contractor, but he entirely approves of my proposal touching mortgage bonds. He feels that I am running far too great a risk in undertaking such alarming responsibilities with a company whose affairs are not free from embarrassment.

The amount of money I have advanced, and which is expended almost entirely in preliminary works, mills, machinery, tools, houses, roads, slides, camp
134 equipments, &c., is, to date, within a few dollars of	$39,000 00
We, G. G. & K., owe our men, tradesmen, &c	29,000 00
We have received from the company and expended	6,530 00
Total expenditures	74,530 00

For this expenditure we have, to date, actually to show of work the list schedule "A," annexed, amounting to $50,462, preliminary expenses for tools for 250 to 300 men, mills, machinery for small timbers, railroads, slides, and numerous costly outlays indispensable

on attacking an expensive work in an entirely wild and distant country. We have expended the original capital invested in the work.

I propose now to the company to surrender to them all the mills, tools, &c., properly accumulated for the work at its cost	$39,000 00
To be paid for the work done	50,362 00
	89,362 00

You will perceive that leaves a profit on our contract so far as $14,800, for interest of money and personal services of the
135 contractors.

Two-thirds of this profit belongs to me personally, and for a settlement in cash I will fully relinquish it.

I propose otherwise to take this $89,362 as follows:

$12,000 in cash you have in hand.
8,000 in cash in 14 days.
6,530 are already paid me, June 7th.
62,832 in the company's mortgage bonds, bearing 3 per cent.

89,362

The estimated amount of my original contract was $175,000.

By referring to schedule B (annexed) you will find an estimate of finishing the canal from its present position, and with its present facilities, amount to $73,868; your engineer will decide how far this is correct.

Add the price I ask for work to date for mills, tools, houses, and sundry appliances, viz	$89,362
To the estimated amount to finish the work	73,868
And the total will be	163,230

136 or about $12,000 less than the estimated amount to be paid G. G. & K. under the contract.

You will, when this work is done, have a mill properly capable of turning out 20,000 feet per day of lumber; on your canal you can float down all your lumber for branch ditches, and I think could let out your mills, with a floating privilege in the canal, for a large monthly rent.

There will be waste boards enough, by the time you have done sawing, to make a watchman's walk along your canal.

You will see by this I am willing to let you have the use of my money. It is not my interest to damage the canal; a suit by me in the United States district court (being an alien) for this amount would lock up the capital of San Francisco from your work, while, on the other hand, the very fact that I sold out to you, and took my
137 pay in bonds to such an amount, would have a correspondingly good effect. I don't arrogate to myself much importance; I

simply am known in this community, and the canal is not known, comparatively.

Touching the bonds I will take nothing but mortgage bonds, but I do not ask preference bonds. It is my interest that the canal should be finished. I propose then that the company create a mortgage (Catlin's personal mortgage bill of '53 will cover the case) to Mr. de Ro, E. W. Church, and some well known man here (Henry Haight, if possible) in trust to secure the payment of 150 bonds of $1,000 each, 6 or 12 months' interest, 3 per cent., payable monthly from the first water receipts. $63,000 paid to me will leave $87,000 in the company's hands to negotiate to pay the contractors who shall complete the work. These bonds may go, if judiciously put on the market; it will require time, and patience, and care to put them afloat.
138 For my own sake I will lend a helping hand. After the first month's interest is advertised and paid they will improve, after the second month is paid you will get more to invest, and so on.

So much for compromise measures; now if, unhappily, you should differ with me, I can only express my regrets, and prepare for war. One dollar more than my present liabilities I cannot allow to go on this work. I feel that I have been badly treated, induced to go into heavy expenditures, urged to increase my outlays when the directors must have known they had not reliable means to pay me; to permit my credit to be disgraced by refusing and dishonoring my checks so as to have them hawked about in the Sacramento valley for half price, as they have been, was an insult and humiliation which
139 I did not expect from the gentlemen composing the board.

Such things render business connexion impossible, and therefore I wish quietly to withdraw, and simply to lend the company a helping hand down here for the reason that my interests have been somewhat seriously involved in these undertakings.

Y'r ob'nt,

(Signed) GEO. GORDON.

This offer is a personal one, but I have no doubt Mr. Kinyon will concur.

140 *Schedule F.—Release.*

This agreement made and entered into this 28th day of June, 1853, between the South Fork Canal Company, of the one part, and Geo. Gordon & Kenyon, of the second part, witnesseth: That whereas difficulties now exist between said parties arising from a contract between them in regard to the construction of the upper portion of the flume of the South Fork canal; and whereas the said Gordon & Kinyon claim of the said South Fork Canal Company a large amount of money for work done by them on said canal; and whereas they have filed a mechanic's lien to secure the same, and have commenced suit in the city of San Francisco to recover said indebtedness as claimed, (as they declare to the company;) and whereas the South Fork Canal Company claim that they are not indebted to said Gordon &
141 Kenyon anything on account of said work, that by the terms of the contract the same had become forfeited by the acts of

Gordon & Kenyon, and the money due them also forfeited to the company; and whereas also said South Fork Canal Co. claim of said Gordon & Kenyon fifty thousand dollars on a bond executed by them to the said company bearing date of the 16th day of March, 1853, conditioned for the completion of said work by the first of July, 1853, and binding themselves to pay to the company the damages they should sustain by a failure to complete the same:

Now, in consideration of the above, and in consideration of $5,000 paid by said company to Gordon & Kenyon, the receipt whereof is hereby acknowledged, the said Geo. Gordon and Kenyon hereby agree to acquit, release, and discharge the said South Fork Canal Company from all claims, debts, and demands arising out of
142 said contract for work and labor performed by them and materials furnished in the construction of the flume of said canal, to dismiss, discharge, and release all suits commenced or to be commenced by them, or claims or mechanic's liens held by them on account of any work done or materials furnished on said work. And the South Fork Canal Company, on their part, hereby agree to release all claim or claims they may have against Gordon & Kenyon, on account of damage arising from a failure to complete said work in a specified time, and all of the contracts heretofore existing between the said parties are hereby cancelled and annulled, and upon the payment of the two thousand dollars aforesaid to the afore-mentioned parties are even upon all matters of difference of any character whatever growing out of all or any of the transactions in regard to the work done or to be done on the flume of the South Fork canal, and hereby mutually release all claims and demands on account of the said Gordon & Kenyon, giving up to the company the work done,
143 materials furnished, and lumber and timber gotten out for constructing of said flume.

Given under our hands and seals this 28th day of June, 1853.

(Signed) B. F. KEENE, [L. S.]
Pres. S. F. C. Co.

(Signed) GEO. GORDON & KENYON, [L. S.]
By A. KINYON.

Attest: C. C. BATTERMAN, D. K. NEWELL.

144 *Schedule G.*

Supplementary notice of lien filed July 7, 1853, at 11 o'clock, in the office of county recorder, of Eldorado county, at Coloma, Mechanics' Lien Book, pag. 239.

Know all men by these presents, that the notice of lien heretofore filed in the recorder's office in Eldorado county, made by Gordon & Kenyon on the South Fork canal, and recorded on the 21st day of June, 1853, on book D of Mechanics' Lien, page 221, is yet binding and in force, and that any release or other discharge of the same made by Alonzo Kenyon or by his authority, is fraudulent, inoperative, and void.

Witness my hand this 16th day of July, 1853.

(Signed) GEO. GORDON.

145 *Schedule H.*

SAN FRANCISCO, *July* 4, 1853.

To directors S. F. C. Co.

GENTLEMEN: I have discovered to my great sorrow and indignation that my late joint contractor has absconded, having been traced on board the Sierra Nevada, of the 1st instant.

I was also informed by one of your principal stockholders that you had settled with him for $5,000. I cannot possibly credit this.

It appears impossible, 1st, that you would give him $5,000 for his interest in our joint contract, or 2d, that you would suffer him to compromise on my account a claim of $100,000 for any such sum, especially when you one and all knew that he had no interest in the concern except in the profits, he himself having repeatedly told you he had no money in the contract and no power to sign any document.

I want to know from you what he has done, and whether, if
146 he has attempted any fraudulent settlement, you consider my entire claim precluded by it.

This goes beyond the bounds of ordinary business disputes, and I ask a plain question, as I would ask you for information about a thief who had stolen from me a bag of coin.

Anxiously waiting your reply, I am, &c.

(Signed) GEO. GORDON.

147 *Schedule I.*

Memorandum of agreement between Alonzo Kenyon and George Gordon to undertake a joint contract in the last 8 miles of the South Fork canal.

1st. That the contract shall be taken jointly, one-third being for the account of A. Kinyon and two-thirds for the account of George Gordon, the capital to be furnished one-third by said Kinyon, as far as he is able, and the balance by George Gordon; and it is agreed that the capital of the said George Gordon above his proportion of two-thirds, shall bear interest at the rate of four per cent. per month to be paid by said Kinyon to said Gordon.

2d. The said Gordon shall supply an intelligent person to represent him on the work, and the said Kinyon shall devote all his time thereto, and shall not, during the continuance of the contract with South Fork Canal Company, take any other contract for other
148 work; and it is agreed that should he do so, he shall forfeit the sum of one thousand dollars per month, the entire contract being jointly undertaken because the said Kinyon agrees to devote his whole time to the superintendence and management of the work. Nevertheless, the said Kenyon shall devote as much time as may be necessary to the completion of his present contracts with the South Fork Canal Company.

3d. The property in the joint contract shall stand in the name of said Gordon till its completion and acceptance, when it shall be appraised and sold, either party being at liberty to buy and the profits

or losses shall be divided, to the said A. Kinyon one-third, and to the said Gordon two-thirds.

4th. The entire financial affairs of the joint contract shall be in the hands of the said Gordon, but neither party shall draw any money employed on the contract during its continuance. It is expressly declared that the parties hereto are not partners, but simply
149 joint contractors, and each will sign his own name only. No contract or sub-contract made by one shall be binding on the other for any amount over one thousand dollars.

Placerville, Feb'ry 25, 1853.

(Signed) GEO. GORDON,
(Signed) A. KINYON.

Schedule J.

PLACERVILLE, *March* 23*d*, 1853.

To the president and board of trustees of the S. F. C. Co.:

We would respectfully inform you that we have made preparation and are now ready to proceed to the performance of our contract upon the company's works.

According to the terms of our contract it is understood that the company will have the level and grade the line of the canal as often and as soon as we desire and whenever we are ready to proceed with the work.

150 We would therefore inform you of our desire that the line of the canal should be at once levelled and that we are now prepared and anxious to proceed with the work.

You will understand, gentlemen, the nature and propriety of this communication when we remind you of the importance and magnitude of the work, the very brief time our contract provides for its completion, and the present favorable season for that particular kind of work.

We desire and would represent the necessity of beginning the work upon the canal at six different places immediately and at the same time.

(Signed) GEO. GORDON & KINYON.
By A. KINYON.

Placerville, 23d March, 1853.

151 *Schedule K.*

PLACERVILLE, *April* 6, 1853.

To the engineer, president, and directors of the South Fork Canal Comp'y:

GENTLEMEN: Please take notice that we remain entirely without instruction as to what part of our work you wish graded and what part requires to be trestled.

If your engineers will give us the chains, (they require to be done either one way or the other,) we will do it without troubling them further until they have leisure to attend to us in the matter, always providing that, if we work without superintendence, the company will be satisfied with our best judgment and exertions in the matter, which

will be given; for errors in judgment we shall not, in such case, hold ourselves responsible. We trust, however, we should make very few.

Your ob't serv't,

(Signed) GEO. GORDON & KINYON.
By GEO. GORDON.

Indorsed: Filed June 12th, 1854.

G. SCHELL, *Deputy Cl'k.*

152 *Def't's exceptions to bill.*

District court of the United States, northern district of California, in equity.

GEORGE GORDON, plaintiff,
vs.
THE SOUTH FORK CANAL COMPANY and others, defendants.

Exceptions by the defendants, the South Fork Canal Company and John A. Read, John Kirk, D. Lisle, and D. K. Newell, to the bill of complaint of George Gordon in the above-entitled cause for impertinence.

1st. exception. For that the bill is impertinent from and including the words "and your orator" on the first page, as marked on said bill drawn, to and including the word "utmost" in the second page.

2d exception. For that the bill is impertinent from and including the words "by which non-payments" on the sixth page of
153 the bill, down to and including the words "one hundred thousand dollars in debt" on same page.

3d exception. For that the bill is impertinent from and including the words "and your orator further shows" on the seventh page of the bill, down to and including the words "canal company" on same page.

4th exception. For that the bill is impertinent from and including the words "that most" on the ninth page of the bill, down to and including the words "month of June," and copies referred to, on same page.

5th exception. For that the bill is impertinent from and including the words "for reason whereof" on the fifteenth page of the bill, down to and including the words "discovery and disclosure," and copies referred to, on the twentieth page of this bill.

154 6th exception. For that the bill is impertinent from and including the words "and that the said defendants Benjamin F. Keene," on the twenty-first page of the bill, down to and including the words "purpose of discovery" on same page.

7th exception. For that the bill is impertinent from and including the first interrogatories, down to and including the thirtieth (30) interrogatory, there being thirty in number, each and every of which are impertinent, as well when set forth as when referred to by the note, and are separately excepted to as impertinent.

8th exception. For that the bill is impertinent from and including Schedule B, down to and including Schedule K, each and every of

which are impertinent, as well when referred to, as when copied, and are separately excepted to as impertinent.

155 In all which particulars the exceptants except to the said bill as impertinent and as lacking in reasonable brevity and succinctness, and as containing unnecessary recitals of deeds, documents, and contracts, and insist that the same should be expunged from the bill.

Exceptants have pointed out as distinctly as they well can these grounds of exception by the paging of the bill as it is on file. They embrace some things in their exceptions which might be retained in the bill if they could with any convenience be separated; and in other instances they have not excepted, because the matter exceptionable could not well be separated. They insist that the bill shall be so reduced and framed as to present only matters necessary and proper for the exhibition of plaintiff's rights and relief, &c.

CROCKETT & PAGE,
Solicitors for Exceptants.

Indorsed: Filed Sept. 4, 1854.

JNO. S. MONROE, *Cl'k.*

156 *Order.*

At a special term of the district court of the United States of America for the northern district of California, held at the court-house in the city of San Francisco, on Wednesday, the 20th day of September, in the year of our Lord one thousand eight hundred and fifty-four. Present, the honorable I. S. K. Ogier, district judge.

GEORGE GORDON
vs.
SOUTH FORK CANAL COMP'Y.

On motion of attorney for defendant, by and with the consent of counsel for plaintiff, ordered by the court that Fletcher M. Haight be appointed special master in the above cause, and that it be referred to him to report upon the exceptions filed in this cause as to impertinence.

Indorsed: Filed September 20th, 1854.

JNO. A. MONROE, *Cl'k.*

157 *Clerk bill.*

Northern district of California, United States district court.

GEORGE GORDON
vs.
SOUTH FORK CANAL COMPANY.

Clerk's fees:

1864.		
June 12.	Filed bill, issued spa	$3 60
	Issued twenty copies spa	30 00
	Issued one spa. and one copy	3 90
	Ret. of spa	50
July 28.	Return of spa.	50

1864.		
Aug. 7.	Appearance, &c	$0 50
Sept. 4.	Exceptions to bill	20
Sept. 20.	Filed and entered order app. special master	1 10
Sept. 25.	Iss. copy of order certified	1 10
1856.		
Sept. 3.	Judg't record, 150 fol., at 22½ cts	33 75
	Dockets, &c	4 50
	Filed costs	15
	Making exemplification of record	45
	Certificate to same	53
		80 48

Indorsed: Filed Sept. 3d, 1856.

158 *Minutes.*

Circuit court of the U. S., in equity.

GEORGE GORDON *vs.* THE SOUTH FORK CANAL COM. } February 2, 1856.—J. T. Boyd, sol'r.

Exceptions to the bill in this cause for impertinence having been heretofore filed in this cause, and an order obtained referring the same to Mr. Fletcher M. Haight as a master in chancery, to report thereon, and the defendants, the South Fork Canal Co., John A. Reed, John Kirk, D. Lisle, and D. K. Newell, who filed said exceptions, having failed to procure the master aforesaid to examine and report on the same before the next succeeding rule day, it is hereby, on motion of James T. Boyd, pl'ff's solicitor, in pursuance of general rule 27, declared that said exceptions are abandoned.

(S'g'd) CUTLER McALLISTER, *D. C.*

I certify the foregoing to be a true copy from the common rule book in equity, of said court.

159 *Report, &c., master.*

In the circuit court for the districts of California, in equity.

GEORGE GORDON *vs.* THE SOUTH FORK CANAL COMPANY, and OTHERS. }

To the circuit court for the districts of California, in equity:

In pursuance of an order made in this cause on the twentieth day of September, 1854, whereby it was referred to the subscriber, as special master, to look into the complainant's bill of complaint and the exceptions taken to the same by the defendants therein, and report whether said exceptions are well taken or not, I, the said special master, do hereby respectfully certify and report that, having been attended

by the counsel of the respective parties, and having looked into
160 said bill and the exceptions taken thereto, and having duly considered the same, I find that the first, second, fourth, fifth, sixth, and seventh exceptions to said bill are not well taken. The eighth exception, being to schedules annexed to said bill, is not an exception, but if so deemed, is not well taken.

And I do fix the time for defendants to put in an answer to said bill at twenty days after this my report shall become absolute; all which is respectfully submitted.

FLETCHER M. HAIGHT.

San Francisco, 4th April, 1857.

Indorsed: Filed April 4th, 1857.

CUTLER McALLISTER, *D. C.*

161 *Minutes.*

Circuit court of the United States for the districts of California.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL COMPANY and OTHERS.

The report of F. M. Haight, esq'r, exception master, to whom it was referred to examine the bill of complaint and the exceptions thereto filed by the defendants, Read *et al.*, and to report whether the same be well taken or not, having been duly filed on the 4th day of April, 1857, and the said master having reported that such exceptions and each and every one of them are not well taken, and having therein fixed the time for said defendants to put in their answers to said bill at within twenty days after his said report should become absolute:

Now, on motion of James T. Boyd, solicitor for the complain-
162 ant, it is ordered that the said report and all things therein contained, be and the same are hereby confirmed, unless cause to the contrary be shown within eight days; and on like motion it is further ordered that the said defendants file their answer to said bill within twenty days after said report shall become absolute, or that the said bill be taken as confessed by such defendants.

Dated San Francisco, April 6, 1857.

(Signed) CUTLER McALLISTER, *D. C.*

A true copy of an entry in the common rule book in equity in the said circuit court.

Attest: GEO. GORHAM, *Clerk.*

San Francisco, Sept. 11, 1865.

163 *Demurrer.*

Circuit court of the United States for the districts of California, in equity.

GEORGE GORDON, complainant,
vs.
THE SOUTH FORK CANAL COMPANY, JOHN A. Read, John Kirk, *et als.*, defendants.

NORTHERN DISTRICT, *ss:*

The defendants, the South Fork Canal Company, John A. Read, John Kirk, and D. K. Newell, by protestation not confessing all or any of the matters and things in the said complainant's bill contained to be true in such manner and form as the same are therein set forth and alleged, do demur to the said bill; and for cause of demurrer show, that the said complainant has not by his said bill made
164 such a case as entitles him in a court of equity to any discovery from these defendants, respectively, or any of them, or any relief against them as to the matters contained in the said bill, or any of such matters; and that any discovery which can be made by these defendants, or any of them, touching the matters complained of in said bill, or any of them, cannot be of any avail to the said complainant for any of the purposes for which a discovery is sought against these defendants by the said bill, nor entitle the complainant to any relief in this court touching any of the matters therein complained of; nor does the said bill of complaint, in case the same were true, which these defendants do in nowise admit, contain any matter of equity whereon this court can ground any decree or give the complainant any relief or assistance as against these defendants; and, further, that it appears by the said com-
165 plainant's own showing in the said bill that Alonzo Kinyon therein named, is a necessary party to the said bill, inasmuch as it is therein shown that the complainant and the said Kinyon were joint contractors for the performance of the work mentioned in the said bill of complaint; but yet the said complainant hath not made the said Kinyon a party to the said bill; and, further, that it does not appear from said bill that the defendants, or any of them, are citizens of the State of California, nor that this court can entertain jurisdiction of said cause, if all the allegations of said bill were true; and, further, that it appears from the complainant's own showing in said bill that Benjamin F. Kean, William H. Smith, John Buchanan, Stanley F. Childs, C. C. Batterman, Obed Harney, Ralph Reynolds, jr., Andrew J. Binney, A. T. Taylor, Charles de
166 Ro, and Edward W. Church are not, nor are any of them necessary or proper parties to said bill, no relief being soug' or prayed for against them or either of them; and yet they are improperly made parties defendant to said bill.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, these defendants do demur thereto; and they pray the judgment of this honorable court whether they shall be compelled to

make any other and further answer to the said bill; and they humbly pray to be dismissed from hence with their reasonable costs in this behalf sustained.

CROCKETT & PAGE,
Solicitors for Def'ts.

D. K. Newell, one of the abovenamed defendants, being duly sworn, deposes that the foregoing demurrer is not interposed for delay.

D. K. NEWELL.

Subscribed and sworn to before me this 30th day of April, A. D. 1857.

WM. STONE BOTTS, *Dep. Cl'k.*

167 NORTHERN DISTRICT OF CALIFORNIA, *ss:*

We, the undersigned Crocket & Page, solicitors in chancery, and of counsel for the defendants within named, do certify that in our opinion the within demurrer is well founded in point of law.

Dated at San Francisco, May 1st, 1857.

CROCKETT & PAGE,
Solicitors for Def'ts.

Indorsed: Filed this 1st day of May, A. D. 1857.
GEO. PEN JOHNSTON, *Clerk.*
WM. STONE BOTTS, *Dep. Clerk.*

I admit service of a copy of within demurrer, affidavit, and certificate, May 1st, 1857.

JAMES T. BOYD,
Sol'r for Comp't.

Notice of Demurrer.

In the circuit court of the United States for the district of California, in equity.

168 GEORGE GORDON
vs.
THE SOUTH FORK CANAL CO., and OTHERS.

NORTHERN DISTRICT, *ss:*

You will please take notice that the demurrer filed to the bill in the above-entitled cause will be brought on for argument on Saturday next, the 29th day of August, instant, at the opening of the court on that day, or as soon thereafter as counsel can be heard, at the court-room of said court, in the city of San Francisco.

Dated San Francisco, August 24, 1857.

CROCKETT & PAGE,
Solicitors for Defendants.

Indorsed: Filed Aug. 24, 1857.

CUTLER McALLISTER, *D. C.*

169 *Order.*

At a special term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house, in the city of San Francisco, on Monday, the 7 day of Dec'r, in the year of our Lord one thousand eight hundred and fifty-seven.

Present: The honorable M. Hall McAllister, judge of said court; the honorable Ogden Hoffman, U. S. district judge.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. } In equity.

And now at this day, on motion of J. G. Baldwin, esq., attorney for def't in this cause,

It is ordered that the demurrer heretofore filed herein be submitted on briefs to be filed by the respective parties.

Indorsed: Filed this 7 day of December, 1857.

GEO. PEN JOHNSTON, *Clerk*,
By CUTLER McALLISTER, *Dep. Clerk.*

170 *Order.*

At a stated term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court , in the city of San Francisco, on Friday, the 19th day of March, in the year of our Lord one thousand eight hundred and fifty-eight.

Present, the honorable M. Hall McAllister, judge of said court.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. } In equity.

And now at this day come the parties to this cause, by their respective solicitors, and by consent of parties it is ordered that the same be submitted to the court on briefs to be filed.

Indorsed: Filed this 19 day of March, 1858.

GEORGE PEN JOHNSTON, *Clerk*,
By CUTLER McALLISTER, *Dep. Clerk.*

171 *Order.*

At a stated term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house, in the city of San Francisco, on Monday, the 5th day of April, in the year of our Lord one thousand eight hundred and fifty-eight.

Present, the honorable M. Hall McAllister, judge of said court.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. } In equity.

And now at this day, counsel having been heard for the respective parties, it is ordered that the demurrer filed in this cause be sustained, and that the costs be paid by the defendants.

Indorsed: Filed this 5th day of April, 1858.

GEO. PEN JOHNSTON, *Clerk*,
By CUTLER McALLISTER, *Dep. Clerk.*

172 *Order.*

At a stated term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house, in the city of San Francisco, on Monday the 5th day of April, in the year of our Lord one thousand eight hundred and fifty-eight.

Present, the honorable M. Hall McAllister, judge of said court.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. } In equity.

Having heard counsel for the respective parties, it is ordered that the demurrer filed in this case be sustained, and costs paid by defendants.

April 5, 1858.

Indorsed: Filed April 5th, 1858.

GEO. PEN JOHNSTON, *Clerk.*

173 *Order.*

In the circuit court of the United States for the districts of California, in equity.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL COMPANY and OTHERS. }

Upon the annexed affidavit of Solomon A. Sharp, and upon the papers and pleadings on file and of record in this action, let the defendants in the above-entitled action, or their solicitors, show cause before the circuit-court of the United States for the district of California, at the court room of the said court in the city of San Francisco, on Monday next, the 12th day of April, instant, at the opening of the court on that day, or as soon thereafter as counsel can be heard, why the order entered in said action on the 5th day of April, 1858, sustaining the demurrer of said defendants to the plaintiff's complaint should not be set
174 aside, and the demurrer re-argued ; or why said order should not be so modified as to allow the plaintiff leave to amend his said complaint, or why such other or further, or further and other,

order in the premises should not be made as shall be agreeable to equity and the rules and practice of this court; and in the meantime, and until the decision of the said application, let all proceedings in the said action be stayed.

6 Ap., '58. M. HALL McALLISTER, *Judge.*

175 *Affidavit of Sol. A. Sharp.*

United States circuit court for the districts of California, in the northern district, in equity.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL COMPANY *et al.*

THE NORTHERN DISTRICT OF CALIFORNIA,
State of California, city and county of San Francisco, ss:

Sol. A. Sharp, being duly sworn, deposes and says that he is a member of the law firm of McDougall & Sharp, and has been so for more than a year past; that about ten days since the said law firm of McDougall & Sharp were engaged and associated as counsel for the plaintiff in the above-named cause with Messrs. Janes, Lake & Boyd; that immediately after being so engaged, to wit, on Saturday,
176 the 27th day of March, A. D. 1858, this affiant, after consulting with Judge Lake, one of the counsel for the said plaintiff, called upon the Hon. M. H. McAllister, presiding judge of said court, and requested of his honor time and permission to file and submit an additional brief and written argument in said cause on behalf of the said plaintiff; that his honor Judge McAllister thereupon granted such time and permission, and kindly allowed affiant to take the briefs which had been submitted for the plaintiffs and defendants, and then told affiant (as this affiant understood at the time) that this affiant need not be in a hurry, but to take full time and prepare an elaborate brief; that he then had under consideration some important ejectment causes, which would occupy his time for two or three weeks to come, and would prevent his bestowing any attention upon the said above-entitled cause during that time, and for that reason
177 affiant need not be in a hurry in preparing said brief and argument.

Affiant further says the said McDougall & Sharp thereupon commenced preparing said brief and argument, but did not hurry in the preparation of the same because of the understanding above detailed, and because of other important business which occupied their attention during that time; that the counsel for the plaintiff were taken by surprise by the decision of the demurrer in said cause on Monday the 5th of April, 1858, and believe that his honor Judge McAllister must have forgotten the conversation and understandings above referred to between his honor and this affiant. Affiant believes, upon a re-argument of the said demurrer, the counsel of plaintiff can overcome and satisfy the objections suggested in the opinion
178 of the court (as published) upon the decision of said demurrer,

that said cause is important, and involves a large amount of money and property; that no serious inconvenience, as affiant believes, can arise to either the plaintiffs or defendants by vacating the order sustaining said demurrer and allowing a re-argument of said demurrer in said cause; that this application is not made for delay, but to the end that justice may be done.

SOL. A. SHARP.

Sworn and subscribed to before me this 6th day of April, 1858.
GEO. PENN JOHNSTON, *U. S. Com'r.*

Indorsed: Service of a copy of written affidavit and order is hereby admitted.
San Francisco, Ap'l 6, 1858.
CROCKETT, BALDWIN & CRITTENDEN.

Filed April 12, 1858.
GEO. PEN JOHNSTON, *Clerk.*

179 *Order.*

At a stated term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Monday, the 12th day of April, in the year of our Lord one thousand eight hundred and fifty-eight.

Present: The honorable M. Hall McAllister, judge of the said court; the honorable Ogden Hoffman, U. S. district judge.

GEORGE GORDON
vs.
SOUTH FORK CANAL COMPANY. } In equity.

And now at this day come the parties to this cause, by their respective solicitors, and a motion being made by solicitor for the complainant herein that there be a re-argument had, it is ordered that the motion be granted.

Indorsed: Filed this 12th April, 1858.
GEO. PEN JOHNSTON, *Clerk,*
By CUTLER McALLISTER, *Dep. Clerk.*

180 *Order.*

At a stated term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Friday, the 30th day of April, in the year of our Lord one thousand eight hundred and fifty-eight.

Present, the Hon. W. Hall McAllister, judge of said court.

GEORGE GORDON
vs.
SOUTH FORK CANAL Co. } In equity.

And now at this day, on motion of J. A. McDonald, esq., solicitor

for compl'ant in this cause, it is ordered that the argument of the demurrer filed herein be set for to-morrow, May first, A. D. 1858.

Indorsed : Filed this 30th day of April, 1858.
GEO. PEN JOHNSTON, *Clerk*,
By CUTLER McALLISTER, *D. C.*

181 *Order.*

At a stated term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Franrisco, on Saturday, the first day of May, in the year of our Lord one thousand eight hundred and fifty-eight. Present, the Hon. M. Hall McAllister, judge of said court.

GEORGE GORDON
v.
THE SOUTH FORK CANAL CO. } In equity.

And now at this day the argument of the demurrer in this cause having been heretofore set for day, and the parties not being ready to proceed, it is ordered that the same be postponed for the present.

Indorsed: Filed first day of May, 1858.
GEORGE PENN JOHNSTON, *Clerk*,
By CUTLER McALLISTER, *D. C.*

182 *Order.*

At a stated term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Thursday, the 27th day May, in the year of our Lord one thousand eight hundred and fifty-eight. Present, the honorable M. Hall McAllister, judge of said court.

GEORGE GORDON
vs.
SOUTH FORK CANAL COMPANY. } In equity.

And now at this day, counsel for the respective parties having been heretofore heard on a demurrer filed in this cause, it is ordered that the bill in this cause be dismissed without prejudice, unless complainant amend his bill within twenty days from date, and upon paymen' of costs.

Indorsed: Filed this 27 day of May, 1858.
GEO. PENN JOHNSTON, *Clerk*,
By CUTLER McALLISTER, *Dep. Clerk.*

183 *Amended bill.*

In the circuit court of the United States for the districts of California.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL COMPANY *et al.*

And now comes the said plaintiff, and by leave of the court first had and obtained therefor, amends his original bill of complaint filed in said action by inserting on page first of the said bill of complaint, immediately after the words D. K. Newall, Benjamin F. Keene, William H. Smith, John Buchanan, Dr. Stanley F. Childs, Daniel J. Lisle, John A. Reed, C. C. Baterman, Obed Harney, Ralph Reynolds, jr., John Kirk, Andrew J. Binney, A. T. Taylor, Charles de Ro, and Edward W. Church, words "who are," and after words "all citizens," on same page, insert words "of the State of California, one."

JAMES T. BOYD, *Att'y for Pl'ff.*

184 STATE OF CALIFORNIA, *City and county of San Francisco, ss:*

George Gordon, the abovenamed plaintiff, being duly sworn, deposes and says that he has read the foregoing amendments to the complaint, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and that as to those matters he believes it to be true.

GEORGE GORDON.

Subscribed and sworn to before me this 14th day of June, A. D. 1858.

GEO. PENN JOHNSTON, *U. S. Com'r.*

Indorsed: Filed June 14, 1850.

GEO. PENN JOHNSTON, *Clerk.*

Acceptance of service.

U. S. circuit court.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL COMPANY.

Due service is hereby admitted of a copy of the amended
185 complaint in the above action.

Dated San Francisco, June 14th, 1858.

CROCKETT, BALDWIN & CRITTENDEN,
Attorneys for Def'ts Newell, &c.

Indorsed: Filed June 14, 1858.

GEO. PEN JOHNSTON, *Clerk.*

Bill of costs.

U. S. circuit court for the districts of California.

GEORGE GORDON
vs.
SOUTH FORK CANAL COMPANY and *als.*

Clerk's fees on sustaining demurrer, ; solicitor's fees on arguing demurrer..... $20 00

NORTHERN DISTRICT OF CALIFORNIA, *ss:*

W'd W. Wiggins, being duly sworn, says he is the clerk of the attorneys for defendant in this action, and as such is better ac-
186 quainted with the costs and disbursements in said action than said defendant; that said disbursements were necessarily incurred therein.

W'D W. WIGGINS.

Sworn to and subscribed before me this 14th day of June, A. D 1858.

I hereby waive taxation verification to the above bill of costs.

JAMES T. BOYD,
Att'y for Plaintiff.

Indorsed: Filed June 14, 1858.

GEO. PEN JOHNSTON, *Clerk.*

Rec'd, San Francisco, June 14, 1858, the amount of within bill of costs this day.

CROCKETT & PAGE,
Attorneys for Defendant.

187 *Demurrer.*

In the circuit court of the United States for the districts of California.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. *et als.*

And the said defendants, the South Fork Canal Co., J. A. Reed and D. K. Newell, and John Kirk, not confessing the said bill amended by plaintiff, come and say that the same and the matters and things therein contained are not sufficient in law for the plaintiff to have and maintain in his action thereon; and for cause of demurrer thereto the said defendants show—

1. That the said bill shows a contract made by plaintiff and one Alonzo Kinyon with the said company, and also shows an abandonment of said contract by the company; and that said bill charges a liability of said company for a breach of said contract, which
188 involves only unliquidated damages, over which a court of chancery has no jurisdiction.

2. That the said bill charges and seeks to enforce a lien upon the property mentioned in the bill, by virtue of the act of the legislature of California giving a lien to mechanics and others for their work, labor, and materials, and this, though the bill itself shows the contract was abandoned; and that therefore the bill shows no equitable cause of action.

3. That the said bill is fatally defective for want of proper and necessary parties, for the said bill charges a fraud in the procurement of a release made by the said Kenyon to the said company, and seeks to act under this release, and claims that the plaintiff is entitled to all the benefits of the contract made by the plaintiff
189 and Kenyon, or with the company; but it does not make Kenyon a party plaintiff or defendant.

4. Because the said bill unites several and incongruous matters, in this, that it seeks a judgment or decree for unliquidated damages for not fulfilling the contract set up in the bill on the part of the defendants; the enforcement of the contract, and a discovery as to both the matters, and the setting aside of the release.

5. And the said bill is multifarious and incongruous in this: that it unites the matters before set out with a claim to set aside a sale of the ditch property mentioned in the premises, made by judgment creditors of the company; with which the defendants, the said company, have nothing to do.

6. Because the said bill is multifarious and incongruous, in
190 this, that in addition to the matters before mentioned, it seeks to set aside a mortgage made subsequently to said contract to de Ro and Church, to secure sundry note and obligations of the company without making the holders of these obligations parties, and without any sufficient reason for not making them such.

7. That no cause of equitable relief is shown in and by the said bill; that the said release is no obstacle to plaintiff's recovery at law on said contract; and that the complainant has shown no right to enforce a lien, nor the existence of any such lien as is set up in the bill, and that the bill is not filed to set up and enforce the same.

Wherefore, because the said bill shows no equity upon its
191 face; that it shows no necessity for and cognizance of a court of chancery over the premises, and no right to any redress as to the matters in said bill contained;

Wherefore, because said bill does not show an equitable cause of action and is defective in the particulars hereinbefore mentioned, the defendants pray that the same may be dismissed, with their costs, &c.

CROCKETT, BALDWIN & CRITTENDEN,
Sol'r for Def'ts.

The undersigned, solicitors in chancery and of counsel for the defendants in the foregoing case, do certify that, in our opinion, the foregoing demurrer is well founded in point of law, and not interposed for delay.

JAS. G. BALDWIN and
A. P. CRITTENDEN,
of Counsel.

Indorsed: Filed July 16, 1856.
CUTLER McALLISTER, *D. C.*

192 *Order.*

At a regular term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Saturday, the 21st day of August, in the year of our Lord one thousand eight hundred and fifty-eight.

Present, the honorable M. Hall McAllister, judge of said court.

GEORGE GORDON
v.
SOUTH FORK CANAL CO. } In equity.

And now at this day it is ordered that the demurrer heretofore filed herein be submitted on briefs to be filed within ten days from date, compl't reserving right to object to special cause assigned.

Indorsed: Filed the 21 day of August, 1858.
GEO. PEN JOHNSTON, *Clerk*,
By CUTLER McALLISTER, *Dep. Clerk.*

193 *Stipulation.*

U. S. circuit court.

GEORGE GORDON
vs.
THE SOUTH FORK COMPANY, JOHN KIRK, and others.

It is hereby stipulated that the demurrer to amended complaint herein be submitted to the court, with leave to file arguments in writing within five days, on either side, pl'ffs reserving the right to object to the presentation of the special causes of demurrer assigned.

McDOUGALL & SHARP, *for Pl'ff.*
CROCKETT, BALDWIN & CRITTENDEN, *for Def'ts.*

Aug. 21, 1858.

Indorsed: Filed Aug. 21, 1858.
CUTLER McALLISTER, *D. C.*

194 *Order.*

At a regular term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Thursday, the twenty-third day of September, in the year of our Lord one thousand eight hundred and fifty-eight.

Present: The honorable M. Hall McAllister, judge of said court; the honorable Ogden Hoffman, U. S. district judge.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. } In equity.

And now at this day, the demurrer to the amended complaint heretofore filed herein having been duly argued by the respective counsel and submitted to the court, and due deliberation being had thereon, it is ordered, adjudged, and decreed that the said demurrer be, and the same hereby is, overruled.

Indorsed: Filed this 23 day of September, 1858.
GEO. PEN JOHNSTON, *Clerk*,
By CUTLER McALLISTER, *Dep. Clerk*.

195 *Opinion.*

GEORGE GORDON
vs.
SOUTH FORK CANAL CO.

The demurrer originally filed in this case has been twice argued, once before the circuit judge and again before both judges; after the second argument the judges united in an order dismissing the case for want of jurisdiction, unless the bill was amended. A second demurrer was filed to the bill, the latter having been amended so as to cure the defective averment as to the citizenship of the parties. In the opinion of the judges delivered on the first demurrer, in relation to the question whether Alonzo Kinyon was not an independent party, it is stated, that although both judges have felt much doubt as to the absent party, they have arrived at the
196 conclusion that although he may be deemed a necessary party, he is not to be considered an indispensable one. His presence, therefore, may be dispensed with in pursuance of the powers vested in this court by the act of Congress of 28 Feb'y, 1839, (5 Statutes at Large,) and the 47th rule of this court. This ground is one of those assigned in the second demurrer. And further reflection has induced the circuit judge to surrender his doubts. The opinion of the judges is therefore united on the point, and the demurrer must be amended. It is accordingly so ordered.

Indorsed: Filed Sept. 23d, 1858.
CUTLER McALLISTER, *D. C.*

197 *Order.*

At a regular term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Friday, the 24th day of September, in the year of our Lord one thousand eight hundred and fifty-eight.

Present: The honorable M. Hall McAllister, judge of said court; the honorable Ogden Hoffman, U. S. district judge.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. } In equity.

And now at this day, on motion of Messrs. Crockett, Baldwin, and Crittenden, solicitors for defendant, and by consent of sol'r for plaintiff, it is ordered by the court that the defendants herein have twenty days' time in which to answer the complaint.

Filed this 24 day of September, 1858.
GEO. PEN JOHNSTON, *Clerk*,
By CUTLER McALLISTER, *Dep. Clerk*.

198 *Order.*

At a regular term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Friday, the 24th day of September, in the year of our Lord one thousand eight hundred and fifty-eight.

Present: The Hon. M. Hall McAllister, judge of said court; the Hon. Ogden Hoffman, U. S. district judge.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL CO. } In equity.

And now at this day, on motion of Messrs. Crockett, Baldwin, and Crittenden, sol'rs for defendant, and by consent of sol'r for plaintiff, it is ordered by the court that the defendants herein have twenty days' time in which to answer the complaint.

Indorsed: Filed this 24th day of September, 1858.
GEO. PENN JOHNSTON, *Clerk*,
By CUTLER McALLISTER, *Dep. Clerk*.

199 *Order.*

GEORGE GORDON, complainant,
vs.
SOUTH FORK CANAL COMPANY *et als.*, defendants in equity.

In the above-entitled cause Lewis B. Harris, Thomas Sunderland, and Thomas Robinson, having filed their petition alleging that they

are interested in the subject-matter of said cause adversely to the complainant, and praying to be made parties defendant therein, and due notice having been given of the said motion, and the court being sufficiently advised in the premises, it is ordered and decreed that the complainant, within ten days after service of a copy of this order on the said complainant or his solicitors, do amend his
200 bill of complaint in such form as to make the said Harris, Sunderland, and Thomas Robinson parties defendant therein. And it is further ordered that the said Harris, Sunderland, and Robinson be, and are hereby, allowed twenty days within which to plead, answer, or demur to said bill, after the said amendment shall have been filed, and a copy thereof served upon the solicitors of the said petitioners; and the deaths of Daniel J. Lisle, B. F. Keane, and John Buchanan, three of the original defendants, being suggested to the court, it is ordered that the same be noted of record in the said cause.

M. HALL McALLISTER, *Judge, &c.*

San Francisco, 11th October, 1858.

Indorsed: Filed 11 Oct., 1858.

CUTLER McALLISTER, *D. C.*

201 *Petition.*

Circuit court of the United States for the districts of California, in equity.

GEORGE GORDON, plaintiff,
vs.
SOUTH FORK CANAL COMPANY, defendants.

NORTHERN DISTRICT, *ss:*

To the Hon. M. H. McAllister, judge of the said circuit court:

The petition of Lewis B. Harris, Thomas Sunderland, and Thomas Robinson respectfully showeth to your honor that they are all citizens of the United States, and of the State of California, and are interested in the subject-matter of the above-entitled cause. Your petitioners aver and state that at the time of the institution of said suit the defendants Daniel J. Lisle and John Kirk were the owners of three-fifths of the said South Fork canal, and of the franchises, rights, interests, and property appertaining thereto, as appears of
201½ record, claiming the same adversely to the complainant; and further, that at the time of the instittution of said suit, one Thomas Y. Read also owned a large interest in said canal, its franchises, property, and rights. And your petitioners further aver and state that during the pendency of said cause the interest so held by said Lisle and Kirk has been duly and legally transferred, conveyed, and assigned to your petitioner, Lewis B. Harris, who is now the lawful owner thereof, and that two-thirds of the interest so held by the said Thomas Y. Read, has, in like manner, been transferred,

conveyed, and assigned to your petitioners, Thomas Sunderland and Thomas Robinson, who are the lawful owners thereof. And your petitioners further represent that they hold and claim their respective interests aforesaid adversely to the complainant, and
202 deny that the same is in any manner subject to the pretended lien of the complainant.

Inasmuch, therefore, as the complainant seeks in his said bill to subject their interests in the said canal to his alleged demand and lien, your petitioners are advised by counsel that in order to protect their said interests it is necessary and proper they should be made parties defendant in said cause, which they pray may be done, and that the complainant be required to amend his said bill for that purpose.

And they further aver that this application is not made for vexation or delay, but only for the ends of substantial justice.

THOS. SUNDERLAND,
CROCKETT & CRITTENDEN,
Solicitors for Petitioners.

Sworn to and subscribed September 28, 1858, before me.
W. W. CHEVERS, *U. S. Commissioner.*

You will please take notice that on Saturday, the 9th day
203 of October, 1858, at the opening of the said circuit court, or as soon thereafter as counsel can be heard, we shall move said court for an order requiring the complainant in the above-entitled cause to amend his bill of complaint, so as to make the said Thomas Sunderland, Thomas Robinson, and Lewis B. Harris parties defendant therein, and for such other order or orders as may be requisite to enable the said petitioners to be heard in defence of their rights in the subject-matter of said suit; and at the same time we shall suggest to the said court the deaths of D. J. Lisle, Benjamin F. Keane, and John Buchanan, three of the defendants, and ask that the same be noted of record.

Dated at San Francisco, this 4th day of October, 1858.

CROCKETT & CRITTENDEN,
Solicitors for Defendants and for the aforesaid Petitioners.

To Mess. McDOUGAL AND SHARP,
Solicitors for Compl't.

204 Indorsed: Rec'd copy of within this 5th day of October, A. D. 1858.

McDOUGALL & SHARP,
Sol. for Compl't.

Filed Oct. 11, 1858.

CUTLER McALLISTER, *D. C.*

Plea and answer.

Circuit court of the United States for the districts of California, in equity.

GEORGE GORDON, complainant,
v.
SOUTH FORK CANAL COMPANY *et als.*, defendants.

NORTHERN DISTRICT, *ss:*

The defendant D. K. Newell, by his solicitors, comes and by protestation not confessing all or any of the matters and things in the said complainant's bill of complaint contained to be true in such
205 manner and form as the same are therein set forth and alleged, for plea to so much and such parts of said bill as allege that the complainants caused a notice of lien pursuant to the statute of the State of California to be filed in the office of the recorder of Eldorado county, giving notice that the complainant and the said Kinyon claimed a lien on the works known as the South Fork canal for one hundred and six thousand four hundred and eighteen dollars, for the work and labor and materials furnished and provided for the said company as in said bill expressed; and also to so much of said bill as alleges that on the 7th day of July, 1853, the complainant caused to be filed in the office of the recorder of Eldorado county, a second or supplementary notice of lien, of which a copy is annexed to said bill of complaint and marked "G"; and also to so much of said bill as alleges that said South Fork Canal Company have, since the
206 first day of July, 1853, confessed voluntarily two judgments, one in the district court of the fourth judicial district of the State of California, for the sum of eighteen thousand five hundred and thirty-seven dollars $\frac{4}{100}$, to Benjamin F. Moulton, of San Francisco, and the other in the district court of the eleventh judicial district in and for the county of Eldorado, in said State, for the sum of fourteen thousand four hundred and ninety-nine $\frac{12}{100}$ dollars, in favor of Ralph Reynolds, senior, and Ralph Reynolds, junior, copartners in business, which judgments the said bill alleges were assigned to John A. Reed, Daniel J. Lisle, and John Kirk; and also to so much of said bill as alleges that under said judgment, on or about the 8th day of May, 1854, at Coloma, in Eldorado county aforesaid, the said canal was sold by the sheriff of said county, and has been purchased by or on behalf of said defendants, John A. Reed, Daniel J. Lisle, John Kirk, and D. K. Newell, or some of them, for the purpose of defrauding the complainant
207 of his just claims and demands, said defendant avers that the judgments aforesaid were based on full, fair, and honest considerations, and the sums for which the same were severally rendered were then justly and honestly due from the said South Fork Canal Company to the said plaintiffs therein, respectively, and the said judgments were fairly and honestly obtained, without fraud or covin; and the said defendant further avers that whilst the said judgments were in full force, unsatisfied and unreversed, executions were dul

and legally issued thereon, directed to the sheriff of the said county of Eldorado, and were placed in the hands of said sheriff to be executed and served according to law, and whilst the same were so in the hands of said sheriff to be executed, and before the return day thereof, he levied the same on the said South Fork canal, and on all the right, title, and interest of the said South Fork Canal
208 Company in and to the said canal, and after advertising the same according to law, sold the same at public auction, by virtue of the said executions and levy, at the court-house door in the town of Coloma, the county seat of the said county of Eldorado, on the 8th day of May, 1854, to Thomas H. Williams, who was the highest and last bidder therefor, at and for the price of $41,183 94¾, and afterwards conveyed the same to said Williams, in pursuance of said sale, by a deed duly executed and delivered; and the defendant avers that the said execution sale was fairly and honestly conducted and was made in good faith, for the purpose of procuring satisfaction of the said executions and the said canal, and all the right, title, and interest of the said South Fork Canal Company in and to the same was purchased at said sale by said Williams in good faith for a valuable consideration, and without any fraud or fraudulent
209 intent whatsoever; and afterwards, to wit, on or about the twenty-second day of January, 1855, the said Williams conveyed three-fifths of said canal to the defendants John Kirk and D. J. Lisle, one-fifth thereof to Thomas Y. Read, and one-third of the remaining one-fifth thereof to Levi T. Carr, and afterwards one-third of the said last-named one-fifth to this defendant, and the said Williams retains in his own right the remaining one-third of the said one-fifth last mentioned; and afterwards, to wit, on or about the day of April, 1855, one-third of the said one-fifth so held by the said Thomas Y. Read as aforesaid was duly conveyed to and vested in this defendant, who conveyed the one-half thereof to said Thos. H. Williams, and they are the lawful holders and owners thereof.

And the said defendant further avers that the only papers ever filed by the complainant and said Kinyon, or either of them, in the office of the recorder of the said county of Eldorado purporting to be a notice or notices of lien held either by the said complainant
210 and the said Kinyon jointly, or by the complainant alone, upon the said South Fork canal were—

Firstly. A paper filed in the said recorder's office, on the 21st day of June, 1853, of which the following is a copy, to wit.

Notice of lien.

GEORGE GORDON and KINYON
vs.
THE S. F. CANAL.

The South Fork Canal Co., Dr. to Geo. Gordon and Kinyon:

1855.—March 15. To grubbing tract of canal.....	$2,400
June 13. To grading earth-work, hard pan rock excavation.....	12,500

Without date:

To lumber, 300 M f't, at $75	$22,500
To 10x10 lumber, 63,000 feet, at 20	12,600
To small timber, 6,600 feet, at 8	5,280
To work on trestle foundation and rolling rocks, 300 days, at $6	1,800
To erection of trestles and laying sills	1,000
To erection of mills for canals	27,000
211 To making roads, railroads, incline planes, houses, and providing tools, machinery, blacksmith shops, and offices for the work	17,438
To camp equipments for men, legal expenses obtaining claim to timber land for canal use, and for travelling expenses of contractors	3,900

Notice is hereby given, that we intend to hold a lien on the works known as the South Fork canal, near Placerville, in Eldorado county, for one hundred and six thousand four hundred and eighteen dollars, being the amount due to the undersigned for work, labor performed, and materials furnished and supplied by them for the use of the said South Fork Canal Company.

San Francisco, June 20, 1853.

(Signed) GEORGE GORDON & KINYON.

Secondly. A paper filed in the said recorder's office by the complainant, on the 7th day of July, 1853, of which the following is a copy, to wit:

212 Know all men by these presents, that the notice of lien hereto filed in the recorder's office in Eldorado county, made by Gordon and Kinyon, on the South Fork canal, and recorded on the 21 day of June, 1853, in book D of Mechanic's Lien Record, page 221, is yet binding and in force, and that any release or other discharge of the same made by Alonzo Kinyon, or by his authority, is fraudulent, inoperative, and void.

Witness my hand this 6th day of July, 1853.

(Signed) GEO. GORDON.

And the said defendant avers that the aforesaid papers are the same which are referred to and relied upon in the complainant's bill as constituting a valid notice of lien upon the said canal, and are the only notice or notices of lien ever filed by the complainant and said Kinyon, or either of them, in the said recorder's office, purporting to be a notice or notices of lien on said canal; and the said defendant relies upon the facts hereinbefore stated and pleaded as a bar to so much of the complainant's bill as seeks to enforce a lien upon the said canal, and to so much and such parts of said bill as prays for

213 any decree or relief whatsoever, as against this defendant, all of which facts the said defendant is ready to verify; wherefore he prays the judgment of the court whether he ought to be compelled to make any other or further answer to the said bill.

CROCKETT, BALDWIN & CRITTENDEN,
Solicitors for Def't.

STATE OF CALIFORNIA, *County of Eldorado, ss:*

D. K. Newell, being duly sworn, deposes that he has read the foregoing plea, and knows the contents thereof, and that the same is not interposed for delay, and that the same is true of his own knowledge, except as to the matters therein stated on his information and belief, and as to those matters he believes it to be true.

D. K. NEWELL.

Sworn to before the undersigned, October 4th, 1858.

JAMES JOHNSON,

Judge of the County Court of Eldorado County, California.

214 We, the undersigned solicitors for the defendant, D. K. Newell, do hereby certify that, in our opinion, the foregoing plea is well founded in point of law.

Dated at San Francisco this 6th day of October, 1858.

CROCKETT, BALDWIN & CRITTENDEN,

Solicitors for Defendant.

And the aforesaid defendant, D. K. Newell, by his solicitors, comes, and, in support of his aforesaid plea, for answer to so much of said bill as he is advised it is material for him to answer unto, answering says, he admits it to be true that a judgment was recovered by Benjamin F. Moulton in the district court of the 4th judicial district against the South Fork Canal Company for the sum specified in said bill, which judgment was rendered on the 25 day of November, 1853; and the amount for which said judgment was rendered was then justly and honestly due from said company to said Moulton, who brought
215 the said suit to recover the same in the ordinary form of law; and the said company, having no just or valid defence thereto, consented that judgment might be rendered in favor of said Moulton, which was accordingly done; and this defendant denies that the said Moulton was a stockholder of said company on the 28th day of June, 1853, and, at the said date, he denies that he was also acting as agent for said company; he also admits that Ralph Reynolds, senior, and Ralph Reynolds, junior, partners in trade, instituted a suit in the district court of the eleventh judicial district, in and for the county of Eldorado, against the said company to recover a large sum justly due and owing from said company to the said Ralph Reynolds, senior, and Ralph Reynolds, junior; and the said company, having no just or valid defence to said action, filed no answer therein; whereupon a judgment was rendered by default against said company for
216 the amount specified in the complainant's bill, to wit, fourteen thousand four hundred and ninty-nine $\frac{12}{100}$ dollars, which was the amount justly due and owing from the said company to the plaintiffs in said action; and the said defendant admits that on the 23d day of June, 1853, the said Ralph Reynolds, junior, was a stockholder and director of said company. Further answering, the said defendant admits that the said two judgments were assigned to John A. Read, Daniel J. Lisle, and John Kirk, but he denies that they were then stockholders and interested in said company, except D. J.

Lisle and John Kirk, who were creditors of said company; and he further admits that by virtue of executions issued on said judgments, the said canal, and all the right, title, and interest of the said company therein, was sold on the 8th day of May, 1854, by the sheriff of Eldorado county to Tho's H. Williams, who was the
217 highest and best bidder therefor, at and for the price of $41,183 94¾; and he also admits that the said purchase was made by said Williams as well on his own account as also on account of the said John A. Reed, D. J. Lisle, John Kirk, and this defendant, all of whom were interested in the said purchase; but he denies that said purchase was made for the purpose or with any intent to defraud the complainant in any manner whatsoever; on the contrary, it was a fair and bona fide purchase for a valuable consideration, and without any fraud or fraudulant intent.

And for answer to such of the special interrogatories propounded in the complainant's bill to this defendant as he is advised it is material for him to answer, he answers as follows, to wit:

To the 29th interrogatory he says that, on the 25th day of November, 1853, a judgment was rendered by the said 4th district
218 court, as hereinbefore stated, in favor of said Moulton against said company, for the sum of eighteen thousand five hundred and thirty-seven $\frac{45}{100}$ dollars, besides costs, which were taxed at $216 50; and he admits that the said company, having no just or valid defence to said action, consented that the said judgment might be rendered; and he denies that on the 28th day of June, 1853, the said Moulton was a stockholder in, and agent for, said company.

He further admits that, on the 8th day of February, 1854, a judgment was rendered in the district court of the eleventh judicial district, in and for the said county of Eldorado, in favor of Ralph Reynolds, senior, and Ralph Reynolds, junior, against said company, for the sum of fourteen thousand four hundred and ninety-nine $\frac{12}{100}$ dollars, besides costs, which were taxed at the sum of $.

And he admits that said company, having no valid or just defence to said action, filed no answer therein; whereupon the plain-
219 tiffs took a judgment by default against said company; and he also admits that on the said 28th day of June, 1853, the said Ralph Reynolds, jr., was a stockholder and director of said company, and that the said two judgments were assigned to John A. Read, Daniel J. Lisle, and John Kirk, but he denies that they, on the said 28th day of June, 1853, were stockholders and directors of the said company; but this defendant has no knoweledge of, and therefore is unable to state, the particular date of the said assignment.

CROCKETT, BALDWIN & CRITTENDEN,
Solicitors for Def't.

STATE OF CALIFORNIA, *County of Eldorado, ss:*

D. K. Newell, being duly sworn, deposes that he has read the foregoing answer, and knows the contents thereof, and that the same

is true of his own knowledge, except as to the matters therein stated on his information and belief, and as to those matters he believes it to be true.

D. K. NEWELL.

Sworn to before the undersigned, October 4th, 1858.

JAMES JOHNSON,
Judge of the County Court of Eldorado County, California.

220 Indorsed: Filed Oct. 12th, 1858.

CUTLER McALLISTER, *D. Clerk.*

Answer.

Circuit court of the United States for the districts of California, in equity.

GEORGE GORDON, complainant,
vs.
THE SOUTH FORK CANAL COMPANY *et als.*, defendants.

NORTHERN DISTRICT, *ss:*

The South Fork Canal Company, one of the defendants in the above-entitled cause, now comes, by its solicitors, and for answer to the bill of complaint therein, or so much thereof as the said defendant is advised is material to be answered, answering says, it is true the said company is a corporation created and organized under the laws of the State of California, for the purpose of constructing a canal or ditch for the conveyance of the waters of the south fork of
221 the American river into the mining region of Placerville and its vicinity, to be used for mining and other purposes. It is also true that about the month of February, 1853, the said company advertised for proposals for the construction of a portion of said canal, being about eight or nine miles of the upper portion thereof, extending from "Long Cañon," to the south fork of the American river; and that the complainant and one Alonzo Kinyon became the contractors for the execution of said work, and thereupon entered into a written contract with said company for the performance thereof, a copy of which contract is exhibited with the complainant's bill, and is marked Schedule A. And at the same time the complainant and said Kinyon executed and delivered to said company, as a part of the same transaction, their certain bond or writing, bearing even date with the said written contract, whereby the said Gordon and Kinyon bound themselves to the said company in the sum of fifty thousand dollars for the faithful performance of said work, according to
222 the said contract, the particular conditions and stipulations of which bond or writing will appear by reference thereto, a copy of which is exhibited with the complainant's bill, and a copy whereof is also hereunto annexed as a part hereof, and marked "Exhibit No. 1." Further answering, this defendant states that it has no infor-

mation sufficient to form a belief whether or not the complainant and said Kinyon had before then been copartners in business, nor whether or not the complainant was a civil engineer, nor whether or not the said Kinyon was a person of little or no means, nor whether or not the inducement, with the complainant, to associate said Kinyon with him in said contract was the fact that said Kinyon was experienced in such work. And this defendant demands proof of the allegations of the bill in this behalf. This defendant denies that it recommended said Kinyon to the complainant as a suitable person to be associated with him in said contract, but has no knowledge whether or
223 nor A. J. Binney, the chief engineer of the said company, so recommended the said Kinyon; but if he did, it was without the knowledge of or any authority from this defendant so to do. Further answering, this defendant avers that it has no knowledge or information whatsoever, except from the complainant's bill, what were the agreements or understanding, if any there were, between said Kinyon and the complainant, touching their relative interests in said contract, nor of the proportion of the losses and profits to be borne by each. The only information which this defendant had on that subject was derived from the written contract above referred to, marked Schedule A, from which this defendant inferred that they were in all respects equal joint contractors, each equally interested in the losses or profits, and each authorized to bind the other as a copartner, in all matters pertaining to the said contract; nor has this defendant any knowledge, information,
224 or belief to the contrary. Further answering, the defendant denies that when said contract or writing was entered into, the said defendant had any knowledge of the pecuniary condition of either the complainant or said Kinyon, and it also denies that the time allowed by said contract was the shortest possible term within which the said work could have been completed. On the contrary, the time allowed was amply sufficient for the purpose, and before entering into said contract the complainant and said Kinyon both examined the entire route of the said proposed canal, and being competent judges of such work, and of the time necessary to complete the same, they entered into the contract with a full knowledge of the premises, and undertook to complete the work within the stipulated time, to wit, by the first day of July next ensuing the date of the contract. This defendant denies explicitly that the said
225 Gordon and Kinyon were delayed in the said work by the failure of the company to furnish the necessary grades. On the contrary, there was no such failure, and the grades and levels were at all times furnished by the engineer of the company, and the necessary instructions and directions given by him to said Gordon and Kinyon, so as to enable them to prosecute the work without delay, and the defendant denies all the allegations of the bill to the effect that the said work was in my respect hindered or delayed, for even a single day, by the want of the necessary grades and levels, or the necessary directions to the contractors for the prosecution of the work. This defendant is unable to state the precise day on

which said contractors first went upon the ground after signing the contract, but distinctly avers that the said grades and levels were furnished as soon as or before the contractors needed them, and were received by them without com-
226 plaint, nor was any complaint ever made by them in respect to said grades and levels until after the first estimate of work had been made by the engineer, at which time, according to the best recollection of this defendant, all said grades and levels for the whole work had been finished. The defendant also denies that said work was necessarily commenced at the upper end of said line, or that said contractors ever did any work on the upper part of said canal. On the contrary the natural, easy, and profitable method of doing the work was to commence it at the lower end and at a point opposite the mills erected by the said contractors a little above the centre of said upper part. those being the only points at which the work was of easy access from the tops of the adjoining mountains, from which the timber was to be procured. The defendant also denies that the month next ensuing the date of the contract was
227 the most favorable month for procuring labor; on the contrary, the season was wet and inclement, and labor could not then be procured for such work in the mountain districts on as favorable terms as later in the season, in addition to which the cost of provisions to feed the men was greatly enhanced by the difficulty and cost of transportation during the wet season. The defendant avers that for these reasons the cost of prosecuting the work during the first six weeks next after the date of the contract was greater than after the summer set in. Further answering, the defendant denies that said company failed to give the contractors the necessary directions about said work, or to lay out the forms, depths, and dimensions of the pits for foundations for mechanical structures before or as soon as the same were needed or required by the contractors, and denies that the contractors were hindered in said work or were put to any expense or loss by reason of any such failure; on the contrary, the defendant avers that the engineer of said company at all times furnished the
228 contractors with all such directions touching the said work as were required by the contract or were necessary to enable the contractors to proceed therewith without delay, and denies that the contractors were compelled to employ an engineer to superintend the work by reason of any omission in these respects by said company. And the said defendant avers that for more than one month before the contractors abandoned the work, the engineer of the company, as he was authorized to do, did at several different times urge the said contractors to place more men on said work, so as to complete it within the contract time; but the contractors failed to put on an additional force, alleging as an excuse that they were unable to procure more laborers. The defendant admits that, with a view to the prosecution of said work, the said contractors erected saw-mills, constructed roads, purchased tools, &c., but at what cost this defendant is wholly ignorant, and has no knowledge or information touching the same, except from the allegations of the bill, and therefore demand proof

229 in this behalf. The defendant also admits that the contractors got out some timber and lumber for said work, which was not used therein, but the amount or particular cost or value of said timber and lumber this defendant does not know, and has no means to ascertain. The same was scattered about in the mountains, and a considerable portion thereof in its rude state; but defendant denies on information and belief that on the said 1st May the said timber and lumber was worth $3,500 at the contract prices, and avers that if the quantity was as great as alleged by the complainant (of which this defendant has no knowledge) that the same would only have been worth $3,300 when completed and placed in the work, and that not more than one-fourth of the labor and expense of doing the same had been incurred by the contractors at said time. The defendant denies that said timber and lumber ought to have been included in the estimate of the engineer for work done under said con-
230 tract, and avers that all the work was included in said estimate, which by the terms of the contract ought to have been included, and there was paid to the said contractors eighty per cent. of the said estimate, as required by the contract. Further answering, the defendant admits that in the latter part of April, or early in May, (the precise date not now being recollected) the engineer of the company directed the contractors to put more men to getting out timber for said work, which directions were given because of the slow and negligent manner in which the contractors were prosecutiug the work, and the said directions were necessary to secure the completion of the work within the time specified in the contract; and it is admitted that, in accordance with said directions, the contractors placed more men at said work, but how many it is unknown to the defendant, nor does the defendant know how much timber was gotten out by them, but denies, on information and belief, that the same was of the value of $10,000, or of greater value than $1,000, nor was it of any value whatsoever to this defendant in the places and in the unfurnished condition in which it was left by the contractors.

231 Further answering, the defendant admits that early in June, and somewhere between the 1st and 5th days of that month, the engineer of said company made another estimate of the work done under the contract, and avers that in said estimate there was embraced all the work done by the contractors which ought to have been included in said estimate, and denies that the engineer failed to include therein any work of any kind which by the terms of the contract the contractors were entitled to have estimated. In said estimate was embraced not only all the work done upon said canal, and all the timber and lumber placed therein, but also large quantities of lumber and timber not used on the line, and which was then in an unfinished state. The defendant avers that said estimate was correct, and that the amount shown thereby to be due to the contractors was all that was due to them for work done under said contract. The defendant denies that there was then due to said contractors twenty-five or thirty thousand dollars, or that there was any amount due to
232 them beyond eighty per cent. of the estimated value of the

work, which eighty per cent. amounted to between fifteen and sixteen thousand dollars.

Further answering, the defendant avers that on the same day on which the said estimate was communicated to said company, it paid to said contractors the sum of four thousand dollars on account thereof, which sum was received by them without complaint either as to the amount paid or as to the estimate, and within the next ensuing two or three days, the said company tendered to said Kinyon the remaining sum due under said estimate, amounting to nearly $12,000, and requested said contractors to proceed with said work; but the said contractors refused to receive said money, or to proceed further with said work, unless the said company would release them from all all damages the said company might sustain by a failure to complete the work within the agreed time, and would also release the aforesaid bond for $50,000, which conditions were refused by said company.

233 Further answering, the defendant denies that said company was aware, on the said 7th June, 1853, that the contractors had on that day mustered their laborers to be paid, in expectation of receiving on that day from the said company the full amount of said estimate, and avers that for some time prior thereto it had become evident that the said work would not be completed within the contract time, and the contractors had before then been preparing to abandon the work, and, in view of such an event, had falsely stated or caused it to be circulated amongst the laborers that this defendant was in arrears to them large sums which it had failed or was unable to pay, and thereby sought to excite a prejudice among the laborers against said company in order to shield themselves from the indignation of their employees.

Further answering, the said defendant avers that no money whatsoever was wrongfully withheld by said company from said contractors after the same became due and payable under said con-

234 tract. On the contrary, the said company kept and performed all the covenants, stipulations, and conditions of said contract by it to have been kept and performed. Nevertheless, the said contractors, foreseeing and being well aware that they would not complete said work within the contract time, and seeking for some excuse to relieve themselves from the said contract, and to evade the payment of the damages to which they would be exposed by a breach thereof, falsely and fraudulently pretended that said company had violated said contract on its part, and under that pretext the said contractors, on the 7th day of June, 1853, notified the said company in writing that they had on that day abandoned said contract, and would proceed no further with said work; whereupon the said company, by a resolution of its board of trustees, declared said contract to have been abandoned by the contractors, and that all moneys due to them from said company were thereby forfeited to said company, which proceedings on the part of said company were expressly authorized by the

235 terms of the contract.

Further answering, the defendant denies that by reason of

the failure of the said company to pay the whole amount of said June estimate on the particular day on which said estimate was completed, that said contractors suffered damage, and were thereby rendered unable to procure laborers to prosecute the work, but avers that said contractors but make this the pretext for avoiding the contract and escaping the heavy damages to which they foresaw they would be subjected for a failure to complete the work within the stipulated time; and defendant denies that by the terms of the contract it was incumbent on said company to pay the amount of the said estimate immediately on the completion of the said estimate.

Further answering, the defendant denies that the said contractors abandoned the contract on account of the supposed insolvency of the company, or because of its failure to pay the full amount of the June estimate on the day on which said estimate was completed, or
236 because they were thereby disabled from procuring laborers; but avers on information and belief that before then the contractors had discovered their inability to comply with the contract, and were anxiously seeking for a pretext to abandon it, and the complainant had before then employed an attorney to advise him when and under what circumstances he could abandon the work and throw up the contract; and under the idea that the failure of the company to make immediate payment of the whole of the June estimate afforded him a reasonable pretext, he availed himself of it to abandon the contract, and in aid of this fraudulent design he wrongfully and maliciously encouraged his laborers in their discontents, and fermented dissatisfaction amongst them, on the plea that the company owed him large sums which they refused or were unable to pay; whereas this defendant, on its information and belief, avers the fact to be that the said contractors did not abandon the contract for any of the reasons set forth and alleged in the complainant's bill, but in fact for
237 the reason that they foresaw they would be unable to fulfil the contract, and would suffer heavy damages by reason of their failure to comply with it.

Further answering, the defendant denies that on the said 7th day June, 1853, the said company was insolvent, and avers that up to that period it had paid to the contractors every dollar they were entitled to, as fast as it became due, and on the day when the said June estimate was made, the said company had much more cash at its command than was sufficient to pay the whole of said estimate; but a portion of their money was at the city of San Francisco, and the said company had sent a special messenger for it, who was delayed on the way a little time, and consequently did not return until a day or two after the said estimate was completed; but the complainant and said Kinyon had a full knowledge of these facts, and when they abandoned the work on the said 7th June they well knew that the money
238 had been sent for and would be there in a day or two, and that the whole amount due under the estimate would be paid without delay. The messenger did accordingly return with the money, and it was tendered, as hereinbefore stated, to the said Kinyon, within two or

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Further answering, the defendant avers that on the same day on which the said estimate was communicated to said company, it paid to said contractors the sum of four thousand dollars on account thereof, which sum was received by them without complaint either as to the amount paid or as to the estimate, and within the next ensuing two or three days, the said company tendered to said Kinyon the remaining sum due under said estimate, amounting to nearly $12,000, and requested said contractors to proceed with said work; but the said contractors refused to receive said money, or to proceed further with said work, unless the said company would release them from all all damages the said company might sustain by a failure to complete the work within the agreed time, and would also release the aforesaid bond for $50,000, which conditions were refused by said company.

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the failure of the said company to pay the whole amount of said June estimate on the particular day on which said estimate was completed, that said contractors suffered damage, and were thereby rendered unable to procure laborers to prosecute the work, but avers that said contractors but make this the pretext for avoiding the contract and escaping the heavy damages to which they foresaw they would be subjected for a failure to complete the work within the stipulated time; and defendant denies that by the terms of the contract it was incumbent on said company to pay the amount of the said estimate immediately on the completion of the said estimate.

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236 because they were thereby disabled from procuring laborers; but avers on information and belief that before then the contractors had discovered their inability to comply with the contract, and were anxiously seeking for a pretext to abandon it, and the complainant had before then employed an attorney to advise him when and under what circumstances he could abandon the work and throw up the contract; and under the idea that the failure of the company to make immediate payment of the whole of the June estimate afforded him a reasonable pretext, he availed himself of it to abandon the contract, and in aid of this fraudulent design he wrongfully and maliciously encouraged his laborers in their discontents, and fermented dissatisfaction amongst them, on the plea that the company owed him large sums which they refused or were unable to pay; whereas this defendant, on its information and belief, avers the fact to be that the said contractors did not abandon the contract for any of the reasons set forth and alleged in the complainant's bill, but in fact for
237 the reason that they foresaw they would be unable to fulfil the contract, and would suffer heavy damages by reason of their failure to comply with it.

Further answering, the defendant denies that on the said 7th day June, 1853, the said company was insolvent, and avers that up to that period it had paid to the contractors every dollar they were entitled to, as fast as it became due, and on the day when the said June estimate was made, the said company had much more cash at its command than was sufficient to pay the whole of said estimate; but a portion of their money was at the city of San Francisco, and the said company had sent a special messenger for it, who was delayed on the way a little time, and consequently did not return until a day or two after the said estimate was completed; but the complainant and said Kinyon had a full knowledge of these facts, and when they abandoned the work on the said 7th June they well knew that the money
238 had been sent for and would be there in a day or two, and that the whole amount due under the estimate would be paid without delay. The messenger did accordingly return with the money, and it was tendered, as hereinbefore stated, to the said Kinyon, within two or

three days after the said 7th June, the complainant having in the interim left that vicinity and gone to San Francisco, or elsewhere.

Further answering, the defendant denies that on the said 7th day of June, or prior thereto, its notes or obligations could have been purchased at 30 cents on the dollar, or that they could have been bought at even so small a discount as five per cent., as was then and is now well known to the complainant.

The defendant has no knowledge what agreements or understandings, if any, were made or had between complainant and Kinyon in regard to the said contract, and their respective rights or interests therein, after the said work was abandoned by them on the 7th June, as aforesaid, and demands proof of such agreements or under-
239 standings, if any existed. This defendant regarded them then, as it has ever since done, as joint contractors and partners, each having authority to bind the other in all matters pertaining to the subject-matter of the partnership.

Further answering, this defendant, on its information and belief, denies that the complainant has disbursed and paid out, in and about the performance of said work, the sum of $73,383 $\frac{94}{100}$ over and above the sums received from said company, and also denies that the actual value of the work done by the said contractors under said contract amounted, at the prices stipulated in said contract, to the sum of $55,000. On the contrary, it did not exceed the sum of $22,769, or thereabouts, the amount of the estimates of the engineer, who by the contract was to ascertain and decide upon the value of the work. The defendant admits that the contractors expended some money, but how much is entirely unknown to this defendant, in erecting two saw-mills and several small houses or shanties, and in making roads,
240 purchasing tools, &c., all which were used by them during the progress of the work, but in May, 1854, were all sold by the complainant, with exception of one saw-mill, of but little value, to John Kirk, who has since then owned and enjoyed them. The defendant, on information and belief, denies that the said mills, roads, tools, &c., cost $39,000, or were ever worth as much as that sum, or that they were worth more than from twelve to fifteen thousand dollars. And on like information and belief, the defendant denies that such contractors would have made a profit of $20,000 on the said work, if they had completed it. And the said defendant, on like information and belief, denies that on the said 7th day of June the said contractors had performed about one-half of the whole work necessary to complete the said canal, and also that they had advanced cash and received liabilities in and about said work to the amount of $84,000. But what precise amount they advanced, or what particular liabilities they incurred, and whether or not the complain-
241 ant has since paid all or any part of such liabilities, this defendant does not know, and has no means of ascertaining, and therefore requires proof in this behalf.

Further answering, the defendant denies that after said work was abandoned various negotiations were had between the complainant and the said company, or between Kinyon and the company, for the ad-

justment of the difficulties between them, or that any negotiations were had until the one which resulted in the execution of the release of the 28th June, hereinafter referred to. But defendant admits that various propositions were sent to said company by the said Gordon and Kinyon, which are embraced in the letters exhibited with the complainant's bill; but the said propositions were wholly disregarded by said company, as unreasonable and inadmissible, and not worthy of consideration. And the defendant also denies that the said company had any knowledge or information that the said complainant and the said Kinyon each represented only his own individual interest in said contract. If there
242 was any such understanding or agreement between the said Gordon and Kinyon, it was wholly unknown to said company; and so far was it from being true that the said Kinyon had no authority to represent or bind the complainant, this defendant, on its information and belief, avers the fact to be that long after the said propositions were submitted by the complainant, and just before the said release was executed which the complainant now seeks to avoid, the said Kinyon was sent by the complainant from San Francisco to Placerville for the express purpose and with full authority to procure a compromise from the company of all the difficulties pending between them; and the defendant avers, on its information and belief, that the said Kinyon, when he entered into said compromise and executed the said release, had express authority from and was fully empowered by the complainant to represent and bind him in any settlement which might be made with said company. Further answering, the defendant denies that said company had any negotiations
243 with said Kinyon touching said compromise or settlement, except as follows, to wit: That on or about the 27 June, 1853, the said Kinyon arrived at Placerville, and late in the afternoon of the same day informed the defendant, John Kirk, that he had come for the express purpose of endeavoring to settle and compromise all the difficulties and disputes pending between said company and Gordon and Kinyon, and during the same evening the said Kirk informed D. K. Newell, the attorney of the company, of the arrival of Kinyon, and what he had said. Nothing further was done on that evening, but on the following morning (the 28th June) said Kinyon, at about 10 o'clock a. m., went to said Newell's office and proposed a settlement of all said disputes and differences between the company and Gordon and Kinyon. Finally the said Kinyon, in the course of said negotiation, agreed, on behalf of himself and the said Gordon, in consideration of $2,000 in cash and $3,000 in stock of the company, and upon condition that the company would release its claim for damages founded on the failure of the contractors to complete
244 the work according to the contract, that Gordon and Kinyon would release whatever demand they had against the company growing out of the contract, and would also relinquish to the company all their right and title to the unfinished work and materials provided for the canal. These terms were assented to by the company, and the paper writing exhibited by the complainant, marked "Schedule F," was then drawn up and executed between the said

company of the one part, and the said Kinyon, for himself and the complainant, of the other part. This paper was executed about 1 o'cl'k p. m. of the same day, to wit, June 28th, and immediately thereafter the said $2,000 in cash and $3,000 in stock was paid to said Kinyon, for himself and the complainant. The said paper is here referred to as containing fully and explicitly the terms of the said settlement. This defendant denies all fraud or fraudulent design in the procuring of said release, and avers that the said company acted in perfect good faith throughout the said transaction, and, so far
245 as this defendant knew or had the means to know, the said Kinyon acted in like good faith. Soon after the execution of said paper the *the* said Kinyon left Placerville, but where he went to this defendant has no knowledge, except as it has since been informed by rumor. But this defendant avers that said Kinyon, in addition to his authority as a partner and joint contractor, had full and express authority from the complainant to make such compromise and settlement with the company of all the pending controversies between the company and Gordon and Kinyon as the said Kinyon might deem advisable. Further answering, the defendant admits that on the 21st June, 1853, the complainant and Kinyon filed in the recorder's office of Eldorado county a paper which the complainant claims to have been a notice of lien on said canal, but this defendant denies that the said paper, under the laws of California, was a valid notice of lien, or had any legal effect as such, or created any lien
246 whatsoever on the said canal, or any part thereof, and it also denies that the debt claimed by the complainant and said Kinyon was such an one as, under the laws of California, could then have been secured by a mechanic's lien; and it also denies that the said ditch or canal was the subject of a mechanic's lien as the law then was. The defendant further avers that the works of said company were divided into two separate sections or ditches, one called and known as the upper canal, extending from Long Cañon to the south fork of the American river, and the other known as the lower canal, extending from "Long Cañon" to the main reservoir, and all the work done or materials furnished by Gordon and Kinyon were done and furnished upon and for the upper canal. The defendant further avers that there was paid to said Gordon and Kinyon, by said company, for and upon account of said work, the sum of $6,424 52 *dollars*, as hereinbefore stated, and all claims which they had upon said company for the remainder of the June estimate was forfeited by
247 their abandonment of the work on the 7th June, so that in fact nothing remains due to them on which to base a mechanic's lien. Further answering, the defendant avers that a majority of the items embraced in the said pretended notice of lien, and much the largest portion in amount, were not and do not purport to be for work done upon said canal, but for alleged expenditures in building mills and houses, constructing roads, buying tools, provisions, and teams, and for getting out timber and lumber which never were used on said work. This defendant is advised that such items do not, and under the law cannot, create any lien on said canal, even though the

said notice was regular and formal, and if it was conceded, as it is not, that the said canal was subject to a lien for any part of the complainant's demand.

Further answering, the defendant admits that the said Gordon and Kinyon commenced a suit in the year 1853 in the district court of the 4th judicial district of California against this defendant to recover a large balance which they claimed to be due to them under
248 said contract, and to enforce their said pretended lien on said canal, in which suit, amongst other good and sufficient defences, this defendant set up and relied upon the said release of the 28th June as a bar to the action; and it is true that, on the 8th day of June, 1854, the complainant voluntarily dismissed said suit, but for what reason or with what intent this defendant is wholly ignorant. It is also true that on the 7th day of July, 1853, the complainant filed in the said recorder's office for Eldorado county a paper which is termed in the bill a supplementary notice of lien, and a copy of which is exhibited with the complainant's bill; but this defendant s advised and charges that the said paper is a nullity, and has no legal effect as a lien or otherwise.

Further answering, the defendant avers that if the complainant and Kinyon ever acquired a lien on said canal by virtue of the
249 paper or papers aforesaid, (which is denied,) the said lien was lost and barred by lapse of time, no work having been done by them on said canal after the 7th day of June, 1853, when they abandoned the contract, except such as they did voluntarily at their own expense, without any promise, undertaking, or agreement, express or implied, that the said company would pay for the same, as appears from the complainant's own showing in his said bill and exhibits.

Further answering, the said defendant denies that the said company or any of its officers or agents combined or confederated with said Kinyon for the purpose of cheating or defrauding the complainant, and also denies that said release was in any respect fraudulent or tainted with fraud. On the contrary, this defendant was
250 advised before and at the time when said release was executed, and then fully believed and yet believes, that if said release had not been made, and without any such release as a defence to the complainant's claim, the complainant and Kinyon, either jointly and severally, were not entitled to recover, and could not lawfully have recovered, one dollar from said company, on account of work done or expenses incurred by them under said contract; and the said company was further advised, and then verily believed and yet believes, that it was entitled to recover and could have recovered from the complainant a large amount in damages, because of his abandonment of the work and his failure to perform the contract; and the said company was induced to consent to said compromise solely because of its desire to avoid a vexatious and expensive law suit, which
251 would have tended to impair the credit of the company and to retard the completion its works. These were the sole considerations which induced this defendant to consent to said

settlement, which it then considered and yet regards as more favorable to the complainant in its terms than would have been adjudged to him in any court of law or equity. This defendant denies that said Kinyon, at the time of the execution of said release, was indebted, either severally or jointly, with James L. Law to said company, on account of any work done by him, and denies that at the time of making said compromise the said company had any knowledge or notice whatsoever of the interests respectfully held by Gordon and Kinyon in said contract, or of the amount, if any, which was furnished by Gordon towards the said work beyond what was
252 furnished by Kinyon, nor that said Gordon was to charge interest on the excess, nor has the said company any knowledge or information now in these respects, except what it has derived from the suits brought against it by the complainant. This defendant further denies that, at the time of executing the said release or at any other time, the said Kinyon offered to sell to said company his interest in said contract for $5,000, or any other sum, or that said Kinyon at any time offered to said company any other terms of settlement than those which were agreed upon and embodied in said release, except that at the same time he offered to sell to the company the said saw-mills, which the company declined to buy; but never at any time offered to sell or compromise with said company his own separate interest in said contract, independently of said Gordon. The defendant denies that said negotiations continued
253 for several days or for a longer period than as above stated, or that the same were conducted with unusual secrecy; on the contrary, the negotiation was made in the same manner, at the same place, and with the same and no greater secrecy than said company always observed in making and executing important contracts; and aver that said negotiation was commenced about 10 o'clock a. m., and concluded about 1 or 2 o'cl'k p. m., on the said 28th June, and not late at night as averred in the bill; and the said defendant denies that during said negotiation the board of directors of said company held their session in a more secret manner or in any different manner from their usual custom, and denies that any agreement for secrecy was made or observed between them, or that there was any agreement or understanding whatsoever between the said com-
254 pany and Kinyon that the said transaction should be kept secret until he could escape from the State, or any understanding of secrecy whatsoever; and denies that the same was kept secret. On the contrary, the said transaction was generally known in Placerville, where it occurred, on the morning of the 29th June; and if it was not known earlier, it was not because of any effort on the part of the said company, its officers or agents, to keep the same secret. The said defendant also denies that any persuasions or undu influences of any kind whatsoever were used by the said company, its officers or agents to induce said Kinyon to enter into the said compromise and to execute the said release, and explicitly denies that any bribe, in any shape or form, was offered or given by said company, its officers or agents, to the said Kinyon for any purpose what-

ever. The defendant also denies that it had any knowledge
255 or any reason to believe that the said Kinyon meditated or was perpetrating a fraud on the complainant in making said compromise; but the said Kinyon, having full authority to settle said controversy, and the said company being no party to any fraudulent designs of the said Kinyon, if any such he entertained, of which the said company was wholly ignorant, this defendant denies that the said release could be impeached because of any secret fraudulent design entertained by said Kinyon, to which the said company, its officers and agents, were not privy. Further answering, the defendant says that, after said release was fully executed, the secretary of said company was instructed by the trustees to issue to said Gordon and Kinyon the said three thousand dollars in stock, but, in receiving the same, the said Kinyon directed the said secretary to issue the same in the name of some person, whose name is not now recollected by this defendant, and the same was so issued by said secretary,
256 and the defendant avers that it was so issued simply because said Kinyon requested it, and not for any other reason or motive, or in furtherance of any fraudulent design whatsoever. Further answering, the defendant denies that said Kinyon left Placerville about 4 o'cl'k in the morning; on the contrary, he left in the afternoon or evening of the 28th June, on horseback, and in company with others, in the direction of San Francisco.

Further answering, the defendant denies that it confessed a judgment to B. F. Moulton, as alleged in the bill; but admits that the said Moulton instituted a suit in the said 4th district court against said company to recover a large sum of money then justly due and owing from said company to said Moulton, and the said company, having no just or valid defence to said suit, consented that judgment might be rendered therein in favor of the plaintiff for the sum of $\$18,537\frac{45}{100}$, which judgment was accordingly entered on the 25th Novem-
257 ber, 1853; but the defendant denies that said judgment was for more than was justly and honestly due to said Moulton, and avers that it was a fair and honest judgment, for a debt justly due; and the defendant also denies that it confessed a judgment in the district court for Eldorado county in favor of Ralph Reynolds, senior, and Ralph Reynolds, junior, as charged in the bill, but admits that said company was indebted to the said Reynolds, senior, and junior, in a large sum of money borrowed of them, and the said Reynolds, senior, and junior, having instituted a suit in said district court against said company to recover the same, and the said company, having no valid or just defence therein, filed no answer; whereupon a judgment was rendered against said company by default for $\$14,499\frac{12}{100}$, being the sum then justly due and owing from the said company to the plaintiff in said suit.

And the said defendant admits that said judgments were
258 afterwards assigned to the defendants, Read, Lisle, and Kirk, and that, by virtue of executions issued on said judgments, the said canal was afterwards sold by the sheriff of Eldorado county to Thos. H. Williams, who was the highest bidder therefor.

And now, having fully answered the said bill, the said defendant prays that said bill be dismissed with costs; and the said defendant, by way of cross bill against the complainant and the said Kinyon, here repeats and reiterates all the averments, allegations, and charges in the foregoing answer contained, and avers that the said company in all things kept and performed the terms and conditions of the written contract, marked "Schedule A" and exhibited with the complainant's bill, which by the said company were to have been kept and performed, but the said Gordon and Kinyon, without any sufficient or valid cause therefor, abandoned the work on the 7th day of June, 1853, and neglected and refused further to perform said contract, and left the said canal in an unfinished condition; and by reason of the said failure, and of the violations of said contract by said Gordon and Kinyon, the said company suffered a heavy damage and became entitled to demand of said Gordon the sum of fifty thousand dollars as specified in the written undertaking of said Gordon, a copy whereof is exhibited with the said bill, and which is marked "Bond;" wherefore said company prays that the said Gordon and Kinyon be made defendants to this cross bill, and be required to answer the same; and if for any cause the said release shall be held to be invalid, then and in that event the said company prays for a decree against said Gordon for the said sum of fifty thousand dollars, and for such other and further relief as in justice and equity the said company is entitled to.

259

CROCKETT & CRITTENDEN,
Solicitors for Defendant.

260 STATE OF CALIFORNIA, *Sacramento county:*

Obed Harney, being first duly sworn, says that he was, at the several dates mentioned in the within and foregoing answer, president of the South Fork Canal Company, defendant in said suit; that affiant has heard the foregoing answer read, and knows the contents thereof to be true, except so far as the same are stated as on information and belief, and as to those things he believes it to be true.

O. HARVEY.

Sworn and subscribed before me this 8th day of October, 1858.

ROBERT ROBINSON,
County Judge, Sac. County, Cal.

Indorsed: Filed Oct. 12th, 1858.

CUTLER McALLISTER, *D. C.*

261 *Answer of A. T. Taylor.*

In the dist. court United States for the northern district of California, in equity.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL *et al.* } In equity.

The defendant, A. T. Taylor, comes, by his solicitors, and for answer to so much of the bill filed in the above-entitled action as he is

advised it is material for him to answer, adopts the answer of the South Fork Canal Company filed herein, and for answer to the interrogatories propounded to him in said bill answers as follows:

Answer to interrogatory 1st: Complainant did enter into said contract with Kinyon; complainant did reside in San Francisco;
262 does not know whether he was a civil engineer or not; does not know whether Kinyon possessed any means or not; has no means of knowing anything about his means; does not know anything at all as to whether Kinyon was competent to act as engineer or not in the execution of said contract.

Answer to 2d interrogatory: If complainant was introduced to Kinyon by means of a note from A. J. Binney, does not know the fact, and does not know what said note contained, if there was one; does not know of any letter being given by Binney introducing said Kinyon, or recommending him in any manner; if there was such, it is unknown to this defendant, and he is also entirely ignorant of its contents; and further, he knows no recommendations of said Kinyon to plaintiff made by any one, as to his character or qualifications as a contractor, or otherwise as to his standing with said company; does
263 not know whether the arrangements with said plaintiff and K. was a copartnership or not; does not know what said arrangement was; does not nor ever has known that there was any arrangements between them as to the manner in which they were to be interested in the contract between them and the S. F. C. Co., except such as he could learn from the contract executed by them and said company for the construction of said work, and he is not aware that any of the officers of said company had any knowledge of said matter; was not aware of any contract between and K. as to the manner in which they were to be interested in their contract with said company, either in writing or verbally; was not aware that there was ever in existence such a paper as the one marked I, nor does he know that any one of the officers or agents of said company were
264 aware of it. He says he never had any reason to suspect there was such a contract. He knew but little of the pecuniary condition of K.; that he had no means of knowing, either at the time mentioned in the question or at any other time, nor does he know that any of the other officers of said company knew or had any means of knowing anything of means, but he had always supposed him a man of quite limited means. He says that K. had before time of the making of the contract of plaintiff and himself with the S. F. C. Co. been a contractor for said comp'y. At one time he and one Law jointly had a contract to complete the unfinished section formerly let to Nye and Delany, and he alone to build the aqueducts upon the Coon Hollow branch; that these are the only contracts now recollected he ever had with the company. He did not fail in the fulfilment of his contracts or in the performance of them before
265 mentioned to the knowledge of defendant, nor, so far as defendant knows, did he become indebted to the company, or any of them; if so, it is not now recollected; thinks that Kinyon had some litigation during the time of his contracts, but cannot now tell

who it was with nor what it was about, nor in what court it was prosecuted; does not know whether his tools or whether any of his property was attached, neither does he know the amount in controversy in said litigation; does not know that there was any funds advanced to said Kinyon by said company, or by any of its members, either to release his tools, or to enable him to go on with his work, or for any other purpose, except the funds advanced by said company as the same became due to him for work done; nor is he aware that any of said company or its officers or members became responsible for said K. in any manner whatever. He first became acquainted with
266 said K. as a foreman or sub-contractor on said work under J. L. Law in the fall or winter of 1852, and thinks it was at that time other members of said company became acquainted with him; that he does not, did not, and had no means of knowing of his means except as before stated, and presumes the same to be the fact as to other members of the company. Has stated all of the contracts and dealings between K. and the company that he knows of, and in none of them is he aware of any indulgences in advances made to him to enable him to perform his contracts or for any other purpose. The defendants learned of the connexion between plaintiff and Kinyon by them putting in a bill jointly for the contract that was awarded to them, and after having the same awarded to them and going on together to do said work; had no other means of knowing, and learned it in no other manner; did not know, prior to the time of the
267 execution of the release, or at any other time, that there was any agreement between pl'ff and K. in regard to said contract that Gordon was to have four per cent. per month interest for his advances, or that he was to have two-thirds of the interest in said contract, or that there was any agreement except such as the law would create between them as partners or joint contractors, and he is not aware that any of the officers or members of said company had any knowledge of that kind.

Said company did require the execution of the bond for $50,000 to plaintiff, and plaintiff was required to justify as to the value of his property. The reason for that justification was, that upon letting the contract the company first demanded said bond to be executed with good and sufficient security, and plaintiff represented himself to said company as being worth about $200,000, and they *they* agreed
268 if he would justify in that amount, that they would take the bond without security; and these were the reasons and the only ones why said justification was taken. Kinyon was not required and did not justify.

Answer to 4th interrogatory: Andrew J. Binney was the engineer of said company, and it was his duty, and he did furnish the grades and levels for said work. Does not know, but presumes, he furnished them at the request of the contractors; does not know why he furnished them; cannot state certainly, but thinks said requests were made in writing, but cannot state any of the particulars connected with said requests; cannot state when the furnishing was commenced or when completed; cannot state whether plaintiff, at the dates named

in said question, addressed a letter or letters to defendants, or either of them, touching said grades, &c., but knows that during these times he addressed them some letters requesting grades and levels;
269 does not know what the contents of these letters were; presumes plaintiff sent defendants the letters marked J and K; as to plaintiff and K. waiving the failure to furnish grades and levels, (if there was any such failure,) all he can say is that they were furnished, and they continued to work by them, and never offered nor did not abandon the contract for that failure, but for another reason.

Answer to 5th interrogatory: The wages of common laborers there, and during that period of time mentioned in the question, was from $40 to $50 per month, and the wages of mechanics, from $65 to $90 per month; there was a very great abundance of such laborers to be had at that time there.

Answer to interrogatory 6th: The engineer of said company made estimates of the work done by the pl'ff and Kinyon under said contract, the first about day of , the next about
270 day of . The amounts of these estimates are not now recollected, nor the number of them, nor the times when made. Nor has he access to the books of said company to enable him to ascertain; that he knew nothing of the amount of work done by said contractors except by the reports and estimates of the engineer. (He has no access to the books of the company so as to enable him to answer this question satisfactorily.)

Answer to 7th interrogatory: Knows nothing touching the alleged tender.

Answer to 8th interrogatory: Thinks said letter was received by the company; does not know at what time.

Answer to 9th interrogatory: Does not know whether after said 7th of June plaintiff and K. did continue a large number or any number of laborers upon said work at the cost of pl'ff or in any other manner.

Answer to 10 interrogatory: Knows they stopped work
271 on the canal some time in June, but does not know the exact date, nor does not know what proportion of said work had been done by them up to that time; had no means of knowing the amount of work done except by the estimates of the engineer.

Answer to interrogatory 11: After said abandonment several letters were received from plaintiff, addressed to said company, aiming at some settlement of the matter, but no negotiations were had, nor were any offers made by the company, except that the contractors should complete the work according to the terms of the contract; thinks pl'ff sent the letter mentioned; thinks it was received; cannot state at what date it was received.

Answer to interrogatory 12: Thinks said letter was addressed as stated in the question, and received; thinks it was filed away with other papers in the office of the company; does not know, but supposes the contents of all these letters were made known to the board of directors.

272 Answer to 13th interrogatory: Presume that letter was sent

and received as the others, but does not remember; and presumes the directors were made acquainted with it.

Answer to 14th interrogatory: About the 28th of June negotiations were had by the company with Kinyon; they were commenced on the evening before and concluded on the evening the release bears date. These negotiations were conducted by the directors of the company sitting as a board at their office, and with said K.; there was no negotiations to the knowledge of this defendant, and he was then a member of said board of directors and present at said meetings, between the company and K. for a sale, or compromise, or a settlement of his interest in said contract, or of any definite interest less than the whole; that the writing or release referred to was then executed by the parties whose names are signed thereto, and that it expresses the
273 conditions and terms of said settlement correctly and fully; that the consideration paid by the company for that release was $2,000 in cash, $3,000 in stock of the company, and the release of the penal bond of $50,000: that there was no other writing of any kind pending said negotiations, or connected therewith, executed by any one.

Answer to 15th interrogatory: No negotiations were had at that time by any of the parties mentioned except those stated in the preceding answer, and at that time defendant knew nothing more of K.'s means than he has before answered, and he refers to those answers as the answer to this question. Kinyon was not then liable, either alone or with any one else, to the company on any of his contracts with them, unless it was the contract of Gordon and Kinyon which was then the subject of dispute. That Kinyon made no representations of his poverty to the knowledge of this def't; he knows nothing of his borrowing or trying to borrow money of any one at said
274 times; states that there was no stipulations, or propositions, or agreements that any other consideration or inducements of any kind whatsoever, or inducements of any kind whatever, should be taken into account or were taken into account by the parties in the execution of the release, except those expressed upon its face; and that there were no stipulations, or agreements, or inducements, except those already stated; said negotiations, probably, were at the time unknown to pl'ff; he was then in San Francisco, and they were conducted in Placerville, but there was no attempt to keep them a secret, nor was there any more secrecy observed in said negotiations than usual with the company when making contracts, receiving bids for work, &c.

The doors of the office were closed to prevent interruption only, and such had been the custom when the contract had been let to plaintiff and K., and when letting contracts and receiving bids for a part of the work.

275 There was no agreement or understanding amongst the members of said court, or any of them, that these proceedings should be kept secret from the public; nor was there any agreement or understanding in regard to secrecy at all. Kinyon conducted the negotiation for Gordon and Kinyon and the board of directors for

themselves, assisted by D. K. Newell, who was present, he being the attorney, and but little occurred except what is embodied in the release, except K. claimed that the company should pay more, and the company, on their part, insisting that they had a right to collect the penalty of $50,000, and that if they released them from that it was sufficient; and after such disputing as that, both parties agreed to the terms in the writing.

Answer to interrogatory 17th: Said negotiations were brought to a close about o'clock p. m. of the 28th, and K. agreed to, and did execute the release for the considerations stated in former answers, and none other, to execute the release. There was no under-
276 standing or agreement of secrecy by any one, to the knowledge of defendant, either till K. could leave Placerville or the State, or for any length of time whatever.

Answer to interrogatory 18: This question is fully answered before, and my former answers are here referred to.

Answer to interrogatory 19: Do not know where said release is, or under whose control it is.

Answer to 20th interrogatory: Said release was prepared by D. K. Newell, at the request of the company and K., and that time he was a stockholder in the company, and also its attorney or legal adviser, but had no other connexion with it. Said Kinyon was not persuaded to execute said release by said Harney or any one else, to my knowledge. Harney was at that time a director; Binney was an engineer and large stockholder in said company, but not a director; Smith was a director and stockholder; Kirk was a stockholder and creditor. There was no persuasions or threats held out to the said K.
277 by any one; nor was defendant, nor does he know that any other one was aware, or that the fact was, that Kinyon, in executing that release, was executing a fraud upon plaintiff. Did not know, had no notice, nor did he believe—nor did any other member of the company, to the knowledge of defendant, know, have notice of, or believe—that K. had no right to make said settlement or execute said release; upon the other hand, they all believed he had the right to compromise both his own and pl'ff's rights in the premises. The matter was not discussed to the knowledge of def't.

Answer to interrogatory 21st: That part of this question touching the consideration for the release has been before answered, and that answer is here referred to. The stock issued was in the name of E. Kinyon; said issuance of stock so made was not for the purpose of defrauding pl'ff or protecting said stock from him, or to conceal said transactions from pl'ff. The trade was made as hereto-
278 fore stated, and the clerk of the board was directed by the board to issue the stock, and then Kinyon directed said clerk to issue in the name of E. Kinyon. The clerk did so. K. gave no reason for such directions, nor were any asked for by any one, to the knowledge of defendant; nor does he know K.'s reasons for having the stock so issued. It was the custom of that company, when a party was entitled to stock, to issue the same to whatever name he might direct. There was no suggestions in the matter made by the

board, nor does he know that the board were aware at the time of said stock being so issued. Nothing had been said by K. or any one of the matter till after the release was executed and delivered and the clerk was directed to issue the stock, when K. requested him to issue it as aforesaid. The release was executed and the payments therefor made at Placerville. Plaintiff was not present thereat. No

279 notice of said transaction was given by the board of directors, or any of them, to pl'ff *of said transaction.* While the same were pending no secret was made by said directors, or any of them, of the execution of said release, or of any of said transactions connected therewith at Placerville, either up to 8 o'clock on the 30th of June, or for any time. The matter was spoken of after the transaction as any other matter would be, and soon became quite generally known in Placerville; and he thinks that on the day following the execution of the release there were but few in Placerville, who were accustomed to pay any attention to the business of said company, who were not aware of it. There was no injunction of secrecy imposed by said directors, or any of them, to the knowledge of defendant, upon themselves or any one else, as to any of the matters connected with said transaction. The office of the company was

280 situated at Placerville. Does not know to what extent the affair of said company and pl'ff and K. had become a matter of notoriety. Supposes, from what he knew of the facts, that they were known and talked of about to the same extent and no further than the affairs of such a transaction usually are. Is not able to say, if the fact was generally known at Placerville of the execution of that release, whether pl'ff would have been advised of the matter or not before the departure of Kinyon, nor does he know whether pl'ff was so advised or not before K. departed, nor whether he departed from the State at all or not. The execution of said release was not divulged by defendants about noon of the 30th of June for the first time; was spoken of and known to those who conversed with any of the members of the board touching the matter (and there was many such) before the 30th of June; for there was no effort at concealment at all. All of this question touching the release has been an-

281 swered before. The money and stock was paid to him by the sec'y of the company; def't does not know and has no means of ascertaining how he kept said money, what he did with it, or what disposition he made of it, either before his departure from Placerville or afterwards; does not know when he departed from Placerville. Said money was paid to K. immediately after the execution of said release, and does not know what K. did with the money afterwards. No public or private announcement, such as mentioned in the question, or of any other kind, were made or caused to be made, by defendants, or either of them, of K.'s departure at any time. The matter became known, as before stated, in the ordinary way, by conversation between parties, when that had become the topic of conversation, and in no other.

Answer to interrogatory 22: Don't know.

Answer to interrogatory 23: Don't know.

282 Answer to interrogatory 24: Don't know.

Answer to interrogatory 25: Don't know.

Answer to interrogatory 26. At that time I had ceased to be a director in said company, and do not know, except as I have learned from rumor, anything about said mortgage or of the relations of de Ro and Church with said company or mortgage.

Answer to interrogatory 27: Don't know.

Answer to interrogatory 30: Am unable to do it.

A. T. TAYLOR.

CROCKETT & CRITTEN,
Solicitors for Def't.

STATE OF CAL'A, *Eldorado county:*

Personally appeared before me on this day, A. T. Taylor, who being by me first sworn, and says he has heard the foregoing answer read, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters stated on information and belief; as to those matters, he believes it to be true.

283 A. T. TAYLOR.

Subscribed and sworn to before me, October 11th, 1858.

JAMES JOHNSON,
County Judge, and ex-officio Judge of the County Court of Eldorado County, California.

Answer of Stanley F. Childs.

In the dist. court United States for the northern dist. of California.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL *et al.*

The defendant Stanly F. Childs comes, by his solicitors, and for answer to so much of said bill filed in said action as he is advised it is material for him to answer, answers and says that he has heard read the answers of A. T. Taylor hereto attached to the interrogatories numbered 1, 3, 4, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 25 and 30; that from one to 10, inclusive, said answers are
284 correct, and he here adopts them as his own; that at the election of the board of directors about the 1st of said June he ceased to be a member of said board and ceased his connexion with the affairs of said company, and therefore is not informed as to the subsequent transactions referred to by the other questions, and cannot therefore answer in regard to them.

STANLEY F. CHILD.

CROCKETT & CRITTENDEN,
Solicitors for Def't.

STATE OF CAL., *Eldorado county:*

Personally appeared before me on this day Stanly F. Childs, who, being by me first sworn, says he has heard the foregoing answer read,

and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief; as to those matters, he believes it to be true.

STANLY F. CHILD.

Subscribed and sworn to before me, October 11th, 1858.

JAMES JOHNSON, *County Judge and ex-officio, of the County Court of Eldorado Co., Cal.*

Indorsed: Filed Oct. 12, 1858.

CUTLER McALLISTER, *D. C.*

285 *Order.*

Circuit court of the United States for the districts of California, northern district, San Francisco, Oct. 16, 1858.

GEO. GORDON
vs.
So. FORK CANAL Co. *et als.*

The subpœna in above-entitled cause having been duly served on Benj. F. Keene, Wm. H. Smith, John A. Reid, C. C. Batterman, Obed Harney, Ralph Reynolds, junior, John Kirk, A. J. Binney, Charles de Ro and Ed. W. Church, defendants in above-entitled cause, as appears by the return of the marshal thereon, and the said defendants having failed to answer within the time prescribed by law, the default of the abovenamed defendants is hereby entered at the request of compl't's solicitors, Mess. McDougall & Sharp.

(Signed) CUTLER McALLISTER, *D. C.*

A true copy of entry in common rule-book in "equity," of said circuit court.

Attest: GEO. C. GORHAM, *Clerk.*

Attest: Sept. 11, 1865.

286 *Stipulation.*

In the United States circuit court, in equity.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL Co. *et al.*

It is hereby stipulated and agreed by and between the respective parties, by their solicitors herein, that the plea of the said defendant D. K. Church, heretofore filed in the above-entitled cause, shall be set for argument before said court, on the 23d day of October inst., at 11 o'clock a. m., or as soon thereafter as counsel can be heard, and

that the same shall be argued and submitted accordingly without further notice.

October 21st, A. D. 1858.

McDOUGALL & SHARP,
Solicitors for Compl't.
CROCKETT & CRITTENDEN,
Solicitors for D. K. Newell.

Indorsed: Filed Oct. 21, 1858.

CUTLER McALLISTER, *D. C.*

287 *Order.*

At a regular term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Thursday, the 21st day of October, in the year of our Lord one thousand eight hundred and fifty-eight.

Present, the honorable M. Hall McAllister, judge of said court.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL CO. } In equity.

And now at this day, on filing the stipulation of the parties herein, and on motion Mess. McDougall & Sharp, solicitors for claimant, it is ordered that the plea of the said defendant, D. K. Newell, heretofore filed herein be set for argument on Saturday, the 23d October, inst.

Indorsed: Filed this 21st day of October, 1858.

GEO. PEN JOHNSTON, *Clerk.*
By CUTLER McALLISTER, *Dep. Clerk.*

288 *Amended and supplemental complaint.*

Circuit court United States, in equity.

GEORGE GORDAN
vs.
THE SOUTH FORK CANAL COMPANY.

And now comes the said plaintiff, and it appearing that Lewis B. Harris, Thomas Sunderland, and Thomas Robinson claim some interest in the said South Fork Canal Company, and in the premises in the said complaint described, and they having the leave of the court to be made defendant, the said complainant files this his amended and supplemental complaint, and says that the said Harris, Sunderland, and Robinson, as he is informed and believes, do claim some interest in the said canal company, and in the said premises in complaint described, the exact nature whereof complainant is ignorant; but this complainant says and charges that the same, if any exist, is subject to the lien and right of complainant in and to the said canal and the premises in complaint described, as his said lien and right is
289 particularly set forth and alleged in said complaint; and he,

said complainant, therefore prays that they be required to exhibit their said claim or right, if any they have, and make proof of the same, and that the said Harris, Sunderland and Robinson be made defendants in this suit, and required to answer the original complaint herein, and this amended complaint, and that whatever right, if any they may be ascertained to have, in the premises aforesaid, be decreed subject to the said lien and right of this complainant; and complainant will ever pray, &c.

McDOUGALL & SHARP,
Solicitors for Complainant.

Dated San Francisco, October 22, 1858.

STATE OF CALIFORNIA, *City and county of San Francisco, ss:*

George Gordon, the said complainant in this cause, being duly sworn, deposes and says on oath that he has read the foregoing amended and supplemental complaint, and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated upon his information and belief,
290 and that as to those matters he believes it to be true.

GEO. GORDON.

Subscribed and sworn to before me this 23d day of October, A. D. 1858.

[SEAL.] F. I. THIBAULT, *Notary Public.*

Indorsed: Service is hereby admitted of a copy of the within, this 23d day of October, 1858.

CROCKETT & CRITTENDEN,
Sol's for Def't named in Answer.

Filed Oct. 23, 1858.

CUTLER McALLISTER, *D. C.*

291 *Answer of Harris et als.*

In the circuit court of the United States for the districts of California, in equity.

GEORGE GORDON, complainant,
vs.
SOUTH FORK CANAL COMPANY *et al.*, defendants.

NORTHERN DISTRICT, *ss:*

The defendants, Lewis B. Harris, Thomas Sunderland, and Thomas Robinson, by their solicitors, come and by protestation not confessing all or any of the matters and things in the said complainant's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, for plea to so much and such parts of said bill as allege that the complainants caused a notice of lien, pursuant to the statute of the State of California, to be filed in

the office of the recorder of Eldorado county, giving notice
292 that the complainant and the said Kinyon claimed a lien on the works known as the South Fork canal for one hundred and six thousand four hundred and eighteen dollars, for the work and labor and materials provided and furnished for the said company, as in said bill expressed; and also to so much of said bill as alleges that on the 7th day of July, 1853, the complainant caused to be filed in the office of the recorder of Eldorado county a second or supplementary notice of lien, of which a copy is annexed to said bill of complaint and marked "G;" and also to so much of said bill as alleges that said South Fork Canal Company have since the first day of July, 1853, confessed voluntarily two judgments, one in the district court of the fourth judicial district of the State of California, for the sum of eighteen thousand five hundred and thirty-seven $\frac{45}{100}$ dollars, to Benjamin F. Moulton, of San Francisco, and the other in the district court of the eleventh judicial district in and for the county of
293 Eldorado, in said State, for the sum of fourteen thousand four hundred and ninety-nine $\frac{13}{100}$ dollars, in favor of Ralph Reynolds, senior, and Ralph Reynolds, junior, copartners in business, which judgments, the said bill alleges, were assigned to John A. Read, Daniel J. Lisle, and John Kirk; and also to so much of said bill as alleges that under said judgment, on or about the 8th day of May, 1854, at Coloma, in Eldorado county aforesaid, the said canal was sold by the sheriff of said county, and has been purchased by or on behalf of said defendants, John A. Reed, Daniel J. Lisle, John Kirk, and D. K. Newell, or some of them, for the purpose of defrauding the complainant of his just claims and demands, the said defendants aver that the judgments aforesaid were based on full, fair, and honest considerations, and the sums for which the same were severally rendered were then justly and honestly due from the said South Fork Canal Company to the said plaintiffs therein, respectfully, and the
294 said judgments were fairly and honestly obtained, without fraud or covin; and the said defendants further aver that while the said judgments were in full force, unsatisfied and unreversed, executions were duly and legally issued thereon, directed to the sheriff of said county of Eldorado, and were placed in the hands of said sheriff to be executed and served according to law; and whilst the same were so in the hands of said sheriff to be executed, and before the return day thereof, he levied the same on the South Fork canal, and on all the right, title, and interest of the said South Fork Canal Company in and to the said canal, and after advertising the same according to law, sold the same at public auction, by virtue of the said executions and levy, at the court-house door in the town of Coloma, the county seat of the said county of Eldorado, on the 8th day of May, 1854, to Thomas H. Williams, who was the highest and best bidder therefor, at and for the price of $41,183 94¾, and
295 afterwards conveyed the same to said Williams, in pursuance of said sale, by a deed duly executed and delivered; and the defendants aver that the said execution sale was fairly and honestly conducted, and was made in good faith for the purpose of procuring

satisfaction of the said executions, and the said canal, and all the right, title, and interest of the said South Fork Canal Company in the same, was purchased at said sale by said Williams in good faith, for a valuable consideration, and without any fraud or fraudulent intent whatever; and afterwards, to wit, on or about the 22d day of January, 1855, the said Williams conveyed three-fifths of said canal to the defendants, John Kirk and D. J. Lisle, one-fifth thereof to Thomas Y. Reed, and one-third of the remaining one-fifth thereof to Levi T. Carr; and afterwards one-third of the last-named one-fifth to D. K. Newell; and the said Williams retains in his own right the remaining one-third of the said one-fifth last mentioned; and afterwards
296 this defendant, Lewis B. Harris, duly acquired the three-fifths of said canal so acquired by them, and the said Harris is now the owner thereof. And the said defendant Sunderland has acquired and is the owner of one-third of the one-fifth of said canal, and the said Robinson has acquired and is the owner of another one-third of the one-fifth of said canal conveyed to the said Thomas Y. Read, as aforesaid, the said Sunderland and Robinson each claiming and holding one-third of one-fifth of said canal under the said Thomas Y. Read.

And the said defendants further aver that the only papers ever filed by the complainant and said Kinyon, or either of them, in the office of the recorder of said county of Eldorado, purporting to be a notice or notices of lien, held either by the said complainant and the
297 said Kinyon jointly, or by the complainant alone, upon the said South canal, were—

Firstly. A paper filed in the said recorder's office on the 21st day of June, 1853, of which the following is a copy, to wit:

Notice of lien.

GEORGE GORDON and KINYON
vs.
THE S. F. CANAL.

The South Fork Canal Company, Dr., to Geo. Gordon and Kinyon:

1853.—March 15. To grubbing tract of canal	$2,400
June 13. To grading earth-work, hardpan excavation	12,500
Without date:	
To lumber, 300 M feet, at $75	22,500
To 10 x 10 timber, 63,000 feet, at $20	12,600
To small timber, 66,000 feet, at 8	5,280
To work on trestle foundation and rolling rocks, 300 days, at $6	1,800
To erection of trestles and laying sills	1,000
To erection of mills for canal	27,000
To making roads, railroads, incline planes, houses, and providing tools, machinery, blacksmith shops, and offices for the work	17,438
To camp equipments for men, legal expenses obtaining claim to timber land for canal use, and for travelling expenses of contractors	3,900

Notice is hereby given that we intend to hold a lien on the works known as the South Fork canal, near Placerville, in Eldorado county, for one hundred and six thousand four hundred and eighteen dollars, being the amount due to the undersigned for work, labor performed, and materials furnished and supplied by them for the use of the said South Fork Canal Company.

San Francisco, June 20th, 1853.

(Signed) GEORGE GORDON & KINYON.

Secondly. A paper filed in the said recorder's office, by the com plainant, on the 7th day of July, 1853, of which the following is a copy, to wit:

Know all men by these presents, that the notice of lien heretofore filed in the recorder's office in Eldorado county, made by Gordon and Kinyon on the South Fork canal, and recorded on the 21st day of June, 1853, in book D of Mechanics' Lien Record, 221, is yet binding
299 and in force, and that any release or other discharge of the same made by Alonzo Kinyon, or by his authority, is fraudulent, inoperative, and void.

Witness my hand this 6th day of July, 1853.

(Signed) GEORGE GORDON.

And the said defendants aver that the aforesaid papers are the same which are referred to and relied upon in the complainant's bill as constituting a valid notice of lien upon the said canal, and are the only notice or notices of lien ever filed by the complainant and the said Kinyon, or either of them, in the said recorder's office, purporting to be a notice or notices of lien on said canal.

And the said defendants rely upon the facts hereinbefore stated and pleaded as a bar to so much of the complainant's bill as seeks to enforce a lien upon the said canal, and to so much and such parts of said bill as prays for any decree or relief whatsoever as against these defendants; all of which facts the said defendants are ready to verify.

300 Wherefore they pray the judgment of the court whether they ought to be compelled to make any other or further answer to said bill.

CROCKETT & CRITTENDEN,
Solicitors for said Defendants.

STATE OF CALIFORNIA, *County of* , *ss:*

Lewis B. Harris, one of the abovenamed defendants, being duly sworn, deposes that he has read the foregoing plea, and knows the contents thereof; and that the same is not interposed for delay; and that the same is true of his own knowledge, except as to the matters therein stated on his information and belief, and that as to those matters he believes it to be true.

LEW. B. HARRIS.

Subscribed and swron to before me this 30th day of October, A. D 1858.

D. S. TERRY, *C. J. Supreme Court.*

301 STATE OF CALIFORNIA, *County of Sacramento, ss:*

Thomas Sunderland, one of the abovenamed defendants, being duly sworn, says that he has read the foregoing plea, and knows the contents thereof; and that the same is not interposed for delay; and that the same is true of his own knowledge, except as to the matters therein stated on his information and belief, and that as to those matters he believes to be true.

THO'S SUNDERLAND.

Subsribed and sworn to before me this 27th day October, A. D. 1858.

CHARLES T. BOTTS,
Judge of the 6th Judicial District of the State of California.

STATE OF CALIFORNIA, *County of Eldorado, ss:*

Thomas Robinson, one of the abovenamed defendants, being duly sworn, says that he has read the foregoing plea, and knows the
302 contents thereof; and that the same is not interposed for delay; and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and that as those matters be believes it to be true.

THO'S ROBERTSON.

Subscribed and sworn to before me this twenty-ninth day of October, A. D. 1858.

JOHN M. HOWELL,
Judge of the District Court, 11th Judicial District, in and for the State of California.

We, the undersigned, solicitors for the defendants, Lewis B. Harris, Thomas Sunderland, and Thomas Robinson, do hereby certify that, in our opinion, the foregoing plea is well founded in point of law.

Dated San Francisco, this 30th day of October, 1850.

CROCKETT & CRITTENDEN,
Solicitors for said Defendants.

Indorsed: Filed Nov. 9th, 1858.

CUTLER McALLISTER, *D. C.*

303 *Order.*

At a regular term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Monday, the 28th day of March, in the year of our Lord one thousand eight hundred and fifty-nine.

Present, the honorable M. Hall McAllister, judge of said court.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. } In equity.

And now at this day, the pleas heretofore filed in this cause having been heretofore duly argued and submitted to the court, and the

court having duly considered the same, it is ordered, adjudged, and decreed that said plea be overruled, and that 20 days time, from this date, be allowed defendants within which to file answer.

Indorsed: Filed this 28th day of March, 1859.
GEO. PEN JOHNSTON, *Clerk*,
By CUTLER McALLISTER, *Dep. Clerk*.

304 *Order.*

At a regular term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Tuesday, the 29th day of March, in the year of our Lord one thousand eight hundred and 59.

Present, the honorable M. Hall McAllister, judge of said court.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. } In equity.

And now at this day, on motion of J. B. Crockett, esq., att'y for def'ts, it is ordered that said att'y be allowed to take the answer of said defendants from the files of the court for the purpose of draughting another answer.

Indorsed: Filed this 29th day of March, 1859.
GEO. PEN JOHNSTON, *Clerk*,
By CUTLER McALLISTER, *Dep. Clerk*.

305 *Order.*

At a regular term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Friday, the 1st day of April, in the year of our Lord one thousand eight hundred and 59.

Present, the honorable M. Hall McAllister, judge of said court.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. } In equity.

And now at this day, this cause being called in its regular order on the calendar, and none of the parties hereto appearing, it is ordered that the same be continued for the term.

Indorsed: Filed this 1 day of April, 1859.
GEO. PEN JOHNSTON, *Clerk*,
By CUTLER McALLISTER, *Dep. Clerk*.

306 *Order.*

At a regular term of the circuit court of the United States of America for the districts of California, in and for the northern dis-

trict, held at the court-house in the city of San Francisco, on Tuesday, the 12th day of April, in the year of our Lord one thousand eight hundred and fifty-nine.

Present, the honorable M. Hall McAllister, judge of said court.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. } In equity.

And now at this day, on motion of the solicitor for the defendants, it is ordered that defendants D. K. Newell, Thomas Sunderland, Lewis B. Harris, and Thomas Robinson be allowed ten days' time, in addition to that heretofore granted, in which to file answers.

Indorsed: Filed this 12th day of April, 1859.

GEO. PEN JOHNSTON, *Clerk*,
By CUTLER McALLISTER, *Dep. Clerk*.

307 *Answer of D. K. Newell.*

Circuit court of the United States for the districts of California, in and for the northern district.

GEORGE GORDON, complainant,
vs.
THE SOUTH FORK CANAL COMPANY,
D. K. Newell *et als.*, defendants. } In equity.

The defendant D. K. Newell, by his solicitors, comes, and not confessing the many errors and misstatements in the bill of complaint contained, for answer to so much thereof as he is advised it is material for him to answer, answering says, that the only papers ever filed by the said Gordon and Kinyon, or either of them, in the office of the recorder of the said county of Eldorado, purporting to be a notice or notices of lien held either by the complainant and the said Kinyon jointly, or by the complainant alone, upon the said South Fork canal, were—

Firstly. A paper filed in said recorder's office, on the 21st
308 day of June, 1853, of which the following is a copy, to wit:

Notice of lien.

GEORGE GORDON and KINYON
vs.
THE S. F. CANAL.

The South Fork Canal Co., Dr., to Geo. Gordon and Kinyon:

1853.—March 15.	To grubbing tract of canal	$2,400
June 13.	To grading earth work, hardpan, rock for excavation	12,500
Without date:		
To lumber, 300 M feet, at $75		22,500
To 10 x 10 timber, 63,000 feet, at 20		12,600
To small timber, 66,000 feet, at 8		5,280

To work on trestle foundation and rolling rocks, 300 days, at $6 ..... $1,800
To erection of trestles and laying sills 1,000
To erection of mills for canal 27,000
To making roads, railroads, incline planes, houses, and providing tools, machinery, blacksmith shops, and offices for the work 17,438
To camp equipments for men, legal expenses and obtaining claim to timber land for canal use, and for travelling expenses of contractors 3,900

309 Notice is hereby given that we intend to hold a lien on his works known as the South Fork canal, near Placerville, in Eldorado county, for one hundred and six thousand four hundred and eighteen dollars, being the amount due to the undersigned for work, labor performed, and materials furnished and supplied by them for the use of the said Fork Canal Company.

San Francisco, June 20th, 1853.

(Signed) GEORGE GORDON & KINYON.

Secondly. A paper filed in the said recorder's office by the complainant on the 7th day of July, 1853, of which the following is a copy, to wit:

Know all men by these presents, that the notice of lien heretofore filed in the recorder's office in Eldorado county, made by Gordon and Kinyon, on the South Fork canal, and recorded on the 21st day of June, 1853, in book of Mechanics' Lien Record, 221, is yet binding and in force, and that any release or other discharge of the same made by Alonzo Kinyon, or by his authority, is fraudulent, inoperative, and void.

310 Witness my hand this 6th day of July, 1853.

(Signed) GEO. GORDON.

And the said defendant avers that the aforesaid papers are the same which are referred to and relied upon in the complainant's bill as constituting a valid notice of lien upon the said canal, and are the only notice or notices of lien ever filed by the complainant and said Kinyon, or either of them, in the said recorder's office, purporting to be a notice or notices of lien on said canal.

And the said defendant is advised and therefore charges that the said papers, either jointly or separately, do not and did not when filed as aforesaid, constitute any valid or legal lien or notice of lien upon the said canal, or any part of it, under the laws of the State of California as aforesaid.

Further answering, the said defendant admits it to be true that a judgment was recovered by one Benjamin F. Moulton, in the district court of the 4th judicial district, against the said South Fork Canal Company, for the sum specified in said bill, which judgment
311 was rendered on the 25th day of November, 1853, and the amount for which said judgment was rendered was then justly and honestly due from said company to said Moulton, who brought the

said suit to recover the same in the ordinary form of law; and the said company, having no just or valid defence thereto, consented that judgment might be rendered in favor of said Moulton, which was accordingly done.

And this defendant denies that the said Moulton was a stockholder of said company on the 28th day of June, 1853, and at the said date he denies that he was also acting as agent for said company. He also admits that Ralph Reynolds, senior, and Ralph Reynolds, junior, partners in trade, instituted a suit in the district court of the eleventh judicial district, in and for the county of Eldorado, against said company, to recover a large sum justly due and owing from said company to said Ralph Reynolds, senior, and Ralph Reynolds, junior; and the said company, having no just or valid defence in said action,
312 filed no answer therein. Whereupon a judgment was rendered by default against said company for the amount specified in the complainant's bill, to wit, fourteen thousand four hundred and ninety-nine $\frac{1}{100}$ dollars, which was the amount justly due and owing from said company to the plaintiff in said action.

And the said defendant admits that on the 28th day of June, 1853, the said Ralph Reynolds, junior, was a stockholder and director of the said company.

Further answering, the said defendant admits that the said two judgments were assigned to John A. Read, Daniel J. Lisle, and John Kirk, but he denies that they were then stockholders and interested in said company, except D. J. Lisle and John Kirk, who were creditors of said company; and he further admits that by virtue of an execution issued on said judgments, the said canal and all the right, title, and interest of the said company therein, was sold, on the 8th day of May, 1854, by the sheriff of Eldorado county, to Thomas H. Williams, who was the highest and best bidder therefor, at
313 and for the price of \$41,183 94$\frac{3}{4}$; and he also admits that the said purchase was made by said Williams as well on his own account as also on account of the said John A. Read, D. J. Lisle, John Kirk, and this defendant, all of whom were interested in the said purchase; but he denies that said purchase was made for the purpose or with any intent to defraud the complainant in any manner whatsoever; on the contrary, it was a fair and bona fide purchase for a valuable consideration and without any fraud or fraudulent intent; and, for a further answer, the said defendant avers that the judgments aforesaid were based on full, fair, and honest considerations, and the sums for which the same were severally rendered were then justly and honestly due from the said canal company to the said plaintiffs therein, respectively, and the said judgments were fairly and honestly obtained, without fraud or covin; and he further avers that whilst the said judgments were in full force, unsatisfied and unreversed, executions were duly and legally issued therein, directed
314 to the sheriff of the said county of Eldorado, and were placed in the hands of said sheriff to be executed and served according to law; and whilst the same were so in the hands of said sheriff to be executed and before the return day thereof, he levied the same

on the South Fork canal, and on all the right, title, and interest of the said South Fork Canal Company in and to the said canal, and after advertising the same according to law, sold the same at public auction by virtue of the said executions and levy, at the court-house door in the town of Coloma, the county seat of the said county of Coloma, on the 8th day of May, to Thomas H. Williams, who was the highest and best bidder therefor, at and for the price of $41,183 94¾, and afterwards conveyed the same to said Williams, in pursuance of said sale, by a deed duly executed and delivered; and the defendant avers that the said execution sale was fairly and honestly conducted, and was made in good faith, for the purpose of procuring satisfaction of the said executions; and the said canal, and all the right, title, and interest of the said South Fork Canal Company in and to the
315 same, was purchased at said sale by said Williams in good faith, for a valuable consideration, and without any fraud or fraudulent intent whatsoever; and this defendant is now the holder and owner of an interest in said canal, derived from said Williams under his said purchase at the execution sale aforesaid, and the said Williams yet retains an interest in said canal, derived under his aforesaid purchase. Further answering. this defendant avers that he has read and carefully examined the answer filed in this cause by the said South Fork Canal Company, being the same filed by said company on the 12th day of October, 1858, and being familiar with the transactions therein referred to, this defendant adopts and refers to the same, and the allegations thereof, as a part of this answer, with the same effect as if the same were herein specially set forth and repeated.

And for answer to the special interrogatories propounded in the said bill to this defendant, he saith that he has read and care-
316 fully examined the answer filed in this cause on the 14th day of October, 1858, by the defendant A. T. Taylor, and this defendant adopts as his own, with like effect as if the same were herein specially set forth and repeated, the answers of said Taylor to the interrogatories numbered respectively 2, 3, 4, 8, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21.

And for answer to the interrogatory numbered 7 he saith: That said tender was made in the city of Placerville, and to the said Kinyon in person; that it was made within two or three days (the precise time not now recollected) after the receipt of the engineer's estimate of June, for which this money was the residue of the payment. The tender was made in gold coin, in one of the rooms of the Eldorado Hotel, and H. H. Smith, C. C. Batterman, as well as now recollected, and D. K. Newell, were present, and made the tender for the company. They were sent by the company with the money to make the tender; they carried it in a large sack, and had it with them in the room
317 at the time of the tender. They showed the money to Kinyon, and told him they had there the amount of the estimate yet unpaid, and had come to pay him, and commenced the count of the money; at the same time they told him that the company had been informed that he and Gordon were going to refuse to go on with the work; that they had so notified them (the Co.;) that (for the com-

pany) they were authorized to tender them this money, and demand of them to go on with the completion of the work. Kinyon replied that the money need not be counted; he was satisfied the amount was there, but that he would not receive it and go on with the work under the contract unless the company would give an extension of time, and release them from the fifty thousand dollar bond, which we told him they would not do; he said then he would not receive the money, and thus the matter ended. The money was furnished by the S. F.

C. Company, who, I believe, borrowed it of B. F. Moulton,
318 which was a part of the consideration for the judgment he recovered mentioned in plaintiff's bill. This tender was made a short time after dark, and while the board of trustees were in session; when the tender was to be made, Kinyon was searched for and could not be found. Information came that he had concealed himself to avoid the tender, and we were sent to find him, and make it, and after some search we found him in a small room, dark, in the hotel, and in bed, and there made the tender. I do not know whether the letter referred to had been received or not; I knew nothing in regard to these letters, except as I learned it from some member of the board of trustees; I saw none of the letters up to that time. I had learned that Gordon and Kinyon had notified the board they wouldn't go on with the work. The reason assigned for refusing the tender
319 was the refusal of the company to extend the time for the completion of the work and the release of the $50,000 bond.

Answer to 16th interrogatory: To that question I answer, not to my knowledge. If anything of the kind was done I know nothing of it, and the same is my answer separately to each of the interrogatories included in that question, except as to the persons conducting the negotiations. I received first the proposition of Kinyon, and communicated it to the board of trustees; after that the negotiations were conducted directly by Kinyon and the trustees, so far as I have any knowledge of the matter. I am unable to state the remarks and replies pending the negotiation. Nothing was discussed in my hearing or to my knowledge after the refusal of the company to buy the mill property, except the price to be paid Gordon and Kinyon for the compromise.

320 Answer to 22d interrogatory: I have no knowledge whatever touching this question.

Answer to 24th interrogatory: I don't know. I was not a member or officer of the board, and had no means of knowing what letters, if any, were received, except when consulted by them, or some member thereof, as their attorney.

Answer to 25th interrogatory: I do not know; I have heard but little said about the difference between G. and K. and the company, until a few days after the settlement between K. and the company. I then often heard the matter talked of in Placerville. I do not know what information, if any, the defendants possessed in the premises.

Answer to 28th interrogatory: The statements contained in the answer of the S. F. C. Company in this cause, touching these judg-

ments, their assignments, and the relation these various par-
321 ties bore to the company, has been read by me, and is correct, and I adopt it as my answer to this question.

Answer to interrogatory 30: I have not now, and never have had, the possession or control of any of the papers, records, or documents or writings mentioned in said question, and therefore cannot set them forth. I do not know where they are, but have been informed that they were in the possession and under the control of complainant's counsel.

And now, having fully answered, prays that said bill of plaintiff be dismissed; that he have a decree for his costs and charges in this behalf expended, and for further and general relief as he may show himself entitled in the premises.

CROCKETT & CRITTENDEN,
Solicitors for Def't.

STATE OF CALIFORNIA, *County of Sonoma:*

Personally appeared before me on this day, at Santa Rosa, in said county, D. K. Newell, who, being by me first sworn, says he
322 has read the foregoing answer, also the answer of the S. F. C. Company, and the answers of A. F. Taylor referred to and adopted in this answer, and that he knows the contents of all of them, and that the same are true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

D. K. NEWELL.

Subscribed and sworn to before me this 18th day of April, A. D. 1859, at Santa Rosa.

WM. CHURCHMAN,
County Judge of Sonoma County, State of California.

Indorsed: Filed April 26, 1859.

CUTLER McALLISTER, *D. C.*

323 *Answer of Sunderland et als.*

In the circuit court of the United States for the districts of California, in and for the northern district, in equity.

GEORGE GORDON, complainant,
versus
THE SOUTH FORK CANAL COMPANY and OTHERS, defendants.

The defendants, Thomas Sunderland, Lewis B. Harris, and Thomas Robinson, by their solicitors, come, and not confessing the many errors and misstatements in the bill of complaint contained, for answer to so much thereof as they are advised it is material for them to answer, answering say: That the only papers ever filed by the said Gordon and Kinyon, or either of them, in the office of the recorder of the said county of Eldorado, purporting to be a notice or notices

of lien held either by the complainant and the said Kinyon jointly, or by the complainant alone, upon the said South Fork canal were—

Firstly. A paper filed in the said recorder's office on the 21st
324 day of June, 1853, of which the following is a copy, to wit:

Notice of lien.

GEORGE GORDON and KINYON
vs.
THE SOUTH F. CANAL.

The South Fork Canal Co., Dr., to George Gordon and Kinyon:

1853.—March 15. To grubbing tract of canal	$2,400
June 13. To grading earth-work, hardpan, rock excavation	12,500
Without date:	
To lumber, 300 feet, at $75	22,500
To 10 x 10 lumber, 63,000 feet, at 20	12,600
To small timber, 66,000 feet, at 8	5,280
To work on trestle foundation and rolling rocks, 300 days, at $6	1,800
To erection of trestles and laying sills	1,000
To erection of mills for canal	27,000
To making roads, railroads, incline planes, houses, and providing tools, machinery, blacksmith shops, and offices for the work	17,438
To camp equipments for men, legal expenses, obtaining claim to timber land for canal use, and for travelling expenses of contractors	3,900

Notice is hereby given that we intend to hold a lien on the
325 work known as the South Fork canal, near Placerville, in Eldorado county, for one hundred and six thousand four hundred and eighteen dollars, being the amount due to the undersigned for work, labor performed, and materials furnished and supplied by them for the use of the said Fork Canal Company.

San Francisco, Jan. 20, 1853.

(Signed) GEORGE GORDON & KINYON.

Secondly. A paper filed in the said recorder's office by the complainant on the 7th day of July, 1853, of which the following is a copy, to wit:

Know all men by these presents, that the notice of lien heretofore filed in the recorder's office, in Eldorado county, made by Gordon and Kinyon on the South Fork canal, and recorded on the 21st day of June, 1853, in book of Mechanics' Lien Record, 221, is yet binding and in force, and that any release or other discharge of the same made by Alonzo Kinyon, or by his authority, is fraudulent, inoperative, and void.

Witness my hand this 6th day of July, 1853.

(Signed) GEO. GORDON.

326 And the said defendants aver that the aforesaid papers are the same which are referred to and relied upon in the complainant's bill as constituting a valid notice of lien upon the said canal, and are the only notice or notices of lien ever filed by the complainant and said Kinyon, or either of them, in the said recorder's office, purporting to be a notice or notices of lien on said canal.

And the said defendants are advised, and therefore charge, that the said papers, either jointly or separately, do not, and did not when filed as aforesaid, constitute any valid or legal lien or notice of lien upon the said canal, or any part of it, under the laws of the State of California, as aforesaid. Further answering, the said defendants admit it to be true that a judgment was recovered by one Benjamin F. Moulton, in the district court of the 4th judicial district, against the said South Fork Canal Company, for the sum specified in said bill, which judgment was rendered on the 25th day of November, 1853,

327 and the amount for which said judgment was rendered was then justly and honestly due from said company to said Moulton, who brought the said suit to recover the same in the ordinary form of law; and the said company, having no just or valid defence thereto, consented that judgment might be rendered in favor of said Moulton, which was accordingly done.

And these defendants deny that said Moulton was a stockholder of said company on the 28th day of June, 1853, and at the said date they deny he was also acting as agent for said company.

They also admit that Ralph Reynolds, senior, and Ralph Reynolds, junior, partners in trade, instituted a suit in the district court of the eleventh judicial district, in and for the county of Eldorado, against said company, to recover a large sum justly due and owing from said company to said Ralph Reynolds, senior, and Ralph Reynolds, junior; and the said company, having no just or valid defence in said

328 action, filed no answer therein, whereupon a judgment was rendered by default against said company for the amount specified in the complainant's bill, to wit, fourteen thousand four hundred and ninety-nine $\frac{1}{100}$ dollars, which was the amount justly due and owing from said company to the plaintiffs in sad action.

And the said defendants admit that on the 28th day of June, 1853, the said Ralph Reynolds, junior, was a stockholder and director of the said company. Further answering, the said defendants admit that the said two judgments were assigned to John A. Read, Daniel J. Lisle, and John Kirk, but they deny that they were then stockholders and interested in said , except D. J. Lisle and John Kirk, who were creditors of said company. And they further admit that by virtue of executions issued on said judgments, the said canal, and all the right, title, and interest of the said company therein, was sold on the 8th day of May, 1854, by the sheriff of Eldorado county, to Thomas H. Williams, who was the highest and best bidder

329 therefor, at and for the price of $41,183 94$\frac{3}{4}$; and they also admit that the said purchase was made by said Williams as well on his own account as also on account of the said John A. Read, D. J. Lisle, John Kirk, and D. K. Newell, all of whom were inter-

ested in the said purchase, but they deny that the said purchase was made for the purpose or with any intent to defraud the complainant in any manner whatsoever. On the contray it was a fair and bona fide purchase for a valuable consideration, and without any fraud or fraudulent intent. And, for a further answer, the said defendants aver that the judgments aforesaid were based on full, fair, and honest considerations, and the sums for which the same were severally rendered were then justly and honestly due from the said canal company to the said plaintiffs therein, respectively, and the said judgments were fairly and honestly obtained
330 without fraud or covin; and they further aver that whilst the said judgments were in full force, unsatisfied and unreversed, executions were duly and legally issued thereon directed to the sheriff of the said county of Eldorado, and were placed in the hands of said sheriff to be executed and served according to law, and whilst the same were so in the hands of said sheriff to be executed, and before the return day thereof, he levied the same on the South Fork canal, and on all the right, title, and interest of the said South Fork Company in and to the said canal; and after advertising the same according to law, sold the same at public auction by virtue of the said execution and levy, at the court-house door in the town of Coloma, the county seat of the said county of Eldorado, on the 8th day of May, 1854, to Thomas H. Williams, who was the highest and best bidder therefor, at and for the price of $41,183 94¾, and afterwards
331 conveyed the same to said Williams, in pursuance of said sale, by a deed duly executed and delivered. And these defendants aver that the said execution sale was fairly conducted and was made in good faith for the purpose of procuring satisfaction of the said executions, and the said canal, and all the right, title, and interest of the said South Fork Canal Company in and to the same, was purchased by said Williams in good faith, for a valuable consideration, and without any fraud or fraudulent intent whatsoever. And these defendants are now the owners and holders of interests in said canal derived through mesne conveyances from said Williams under his said purchase at the execution sale aforesaid, and the said Williams yet retains an interest in said canal derived under his aforesaid purchase; and in respect to the other allegations in said bill of complaint contained,
332 these defendants say they have no personal knowledge thereof, the transactions therein referred to having occurred prior to the time when these defendants acquired an interest in said canal, but they have read and examined the answer filed in this cause by their co-defendant, the South Fork Canal Company, and on their information and belief they aver that said answer is true, and they adopt and refer to the same as a part hereof, with like effect as if all the allegations and denials thereof were herein specially set forth and repeated upon the information and belief of these defendants.

And having fully answered, they pray that the complainant's bill be dismissed with costs.

CROCKETT & CRITTENDEN,
Solicitors for Defendants.

STATE OF CALIFORNIA, *Sacramento County:*

Lewis B. Harris and Thos. Sunderland, two of the defendants named in the within and foregoing answer, being first duly
333 sworn, say they have read the said answer, and know the contents thereof to be true of their own knowledge, except so far as the same are stated on information and belief, and as to those things they believe it to be true.

THOS. SUNDERLAND.
LEW. B. HARRIS.

STATE OF CALIFORNIA:

I, Stephen S. Field, a justice ef the supreme court of the State of California, do hereby certify that on this 18th day of April, 1859, the abovenamed L. B. Harris and Thos. Sunderland signed and swore to the above and foregoing affidavit before me. I also certify that I am a justice of said court, and that the same is a court of record.

STEPHEN J. FIELD,
Justice of the Supreme Court, California.

Indorsed: Filed April 26, 1859.

CUTLER McALLISTER, *D. C.*

334 *Replication.*

Circuit court of the United States for the districts of California, in and for the northern district, in equity.

GEORGE GORDON, complainant,
vs.
THE SOUTH FORK CANAL COMPANY *et als.*, defendants.

The replication of George Gordon, complainant, to the answer of D. K. Newell, one of the abovenamed defendants.

This repliant, saving and reserving to himself now and at times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereto says that he will aver, maintain, and prove his bill of complaint to be true, certain, and sufficient in the law to be answered unto; and that the said answer of the said
335 defendants is uncertain, untrue, and insufficient to be replied unto by this affiant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed and denied, is true; all which matters and things this repliant is and will be ready to aver, maintain, and prove as this honorable court shall direct; and humbly prays as in and by his said bill he has already prayed.

Dated April 30, 1859.

McDOUGALL & SHARP,
Sol. for Compl't.

Indorsed: Filed April 30, 1859.

GEO. PEN JOHNSTON, *Clerk.*

336 Circuit court of the United States for the districts of California, in and for the northern district, in equity.

GEORGE GORDON, complainant,
vs.
THE SOUTH FORK CANAL COMPANY *et als.*, defendants.

The replication of George Gordon, complainant, to the joint answer of Thomas Sunderland, Lewis B. Harris, and Thomas Robinson, defendants.

This repliant, saving and reserving to himself now and at all times hereafter all and all manner benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereto says that he will aver, maintain, and prove his bill of complaint to be true, certain, and sufficient in the law to be answered unto; and that the said answer of the said defendants is uncertain, untrue, and insufficient to replied unto;
337 without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver, maintain, and prove as, this honorable court shall direct; and humbly prays as in and by his said bill he has already prayed.

Dated April 30, 1859.

McDOUGAL & SHARP,
Sol. for Compl't.

Indorsed: Filed April 30, 1859.

GEO. PEN JOHNSTON, *Clerk.*

338 Circuit court of the United States for the districts of California, in and for the northern district, in equity.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL COMPANY *et als.*

The replication of George Gordon, complainant, to the answer of the South Fork Canal Company, one of the abovenamed defendants.

This repliant, saving and reserving to himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that he will maintain and prove his bill of complaint to be true, certain, and sufficient in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing what-
339 soever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied,

is true; all which matters and things this repliant is and will be ready to aver, maintain, and prove as this honorable court shall direct; and humbly prays as in and by his said bill he has already prayed.

Dated May 3, 1859.

McDOUGALL & SHARP,
Sol. for Compl't.

Indorsed: Notice of filing replications to def'ts' answers in above case is hereby waived, May 3, 1859.

CROCKETT & CRITTENDEN,
Sol's for Def'ts.

Filed May 3, 1859.

GEO. PEN JOHNSTON, *Cl'k.*

340 *Order.*

At a regular term of the circuit court of the United States of America for the districts of Calfornia, in and for the northern district, held at the court-house in the city of San Francisco, on Friday, the 13th day of January, in the year of our Lord one thousand eight hundred and 60.

Present, the honorable M. Hall McAllister, judge of said court.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. *et al.* } In equity.

And now at this day, on motion of solicitor for complainant, it is ordered that this cause be referred to Cutler McAllister, master in equity of this court, to take testimony herein.

Indorsed: Filed this 13th day of January, 1860.

CUTLER McALLISTER, *Clerk.*

341 *Order.*

At a regular term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Friday, the 13th day of Jan'y, in the year of our Lord one thousand eight hundred and 60.

Present, the honorable M. Hall McAllister, judge of said court.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. *et als.* } In equity.

And now at this day, on motion of sol'rs for complainants, it is ordered that this cause be referred to Cutler McAllister, master in equity of this court, to take testimony herein.

M. HALL McALLISTER, *Judge, &c.*

Indorsed: Filed this 13th day of January, 1860.

CUTLER McALLISTER, *Clerk.*

342 *Order.*

At a regular term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Monday, the 23d day of January, in the year of our Lord one thousand eight hundred and 60.

Present, the honorable M. Hall McAllister, judge of said court.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. } In equity.

And now at this day, this cause being called in its regular order on the calendar, and none of the parties hereto appearing, it is ordered that the said cause be passed to the foot of the docket.

Filed this 23d day of January, 1860.

CUTLER McALLISTER, *Clerk.*

343 *Order.*

At a regular term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Tuesday, the 26th day of January, in the year of our Lord one thousand eight hundred and 60.

Present, the honorable M. Hall McAllister, judge of said court.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. } In equity.

And now at this day, this cause being called in its regular order on the calendar, by consent of the solicitors for the respective parties, it is ordered that the said cause be passed to the foot of the docket.

Indorsed: Filed this 26th day of January, 1860.

CUTLER McALLISTER, *Clerk.*

344 *Stipulation.*

In the circuit court of the United States for the districts of California, northern district, in equity.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL COMPANY and OTHERS. }

It is hereby stipulated that all depositions taken in this cause now in the possession of the clerk of the court may be opened by him and placed on file among the papers herein.

McDOUGALL & SHARP,
Att'ys for Pl'ff
CROCKETT & CRITTENDEN,
Att'ys for Def'ts.

San Francisco, July 1st, 1860.

Indorsed: Filed Feb'y 1st, 1860.

CUTLER McALLISTER, *Clerk.*

345 *Order.*

At a regular term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Monday, the 20th day of February, in the year of our Lord one thousand eight hundred and 60.

Present, the honorable M. Hall McAllister, judge of said court.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. } In equity.

And now at this day, on motion of solicitors for complainant, it is ordered, solicitor for defendants thereto consenting, that the said case be set for hearing on Tuesday, the 28th day of February, A. D. 1860.

Indorsed: Filed this 20th day of February, 1860.

CUTLER McALLISTER, *Clerk.*

346 *Order.*

At a regular term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Tuesday, the 28th day of February, in the year of our Lord one thousand eight hundred and sixty.

Present, the honorable M. Hall McAllister, judge of said court.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. } In equity.

And now at this day, this cause having heretofore been set for hearing this day, by consent of the solicitors for the respective parties, it is ordered that the said cause be continued for the term.

Indorsed: Filed this 28th day of February, 1860.

CUTLER McALLISTER, *Clerk.*

347 *Order.*

At an extra term of the circuit court of the United States of America for the districts of California, in and for the northern districts, held at the court-house in the city of San Francisco, on Monday, the 12th day of November, in the year of our Lord one thousand eight hundred and sixty.

Present, the honorable M. Hall McAllister, judge of said court.

GEORGE GORDON
vs.
SO. FORK CANAL COMPANY. } In equity.

And now at this day, it being suggested to the court that Thomas

Robinson, one of the defendants herein, has departed this life, on motion of sol'r for compl't, it is ordered that be substituted on the record in his stead.

CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICTS OF CALIFORNIA, NORTHERN DISTRICT, CLERK'S OFFICE.

I hereby certify the foregoing to be a true copy from the minutes.

HENRY HYDE, *Clerk.*

348 *Order.*

At a regular term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Wednesday, the 23d day of January, in the year of our Lord one thousand eight hundred and 61.

Present, the honorable M. Hall McAllister, judge of said court.

GEORGE GORDON *vs.* SOUTH FORK CANAL Co. *et al.* } In equity.

And now at this day come the parties to this cause, by their respective solicitors, and the death of Thos. Robinson, one of the def'ts, having been suggested to the court, on motion of Hall McAllister, sol'r for compl't, and by consent of def'ts' solicitor, it is ordered that the hearing of this cause be postponed until Feb'y 20, 1861.

Indorsed: Filed this 23d day of January, 1861.

CUTLER McALLISTER, *Clerk.*

349 *Affidavit of J. B. Crockett.*

Circuit court of the United States for the districts of California.

GEORGE GORDON *vs.* SOUTH FORK CANAL COMPANY *et als.* }

J. B. Crockett, being sworn, says that he is informed and believes that Thomas Robinson, one of the defendants in this cause, is dead, and that Mrs. Caroline Robinson, his widow, of Placerville, Eldorado county, has been duly appointed by the probate court of said county administrator of his estate, and has qualified and is acting as administratrix.

And deponent says further, that he is informed and believes that Daniel J. Lisle, another of the defendants in this cause, has died since the commencement of the suit, and that John Q. Lisle, of the city and county of Sacramento, has been duly appointed, and has qualified and is acting as the administrator of the estate of said Daniel J. Lisle.

J. B. CROCKETT.

350 Subscribed and sworn to before me this 23d Feb'y, A. D. 1861.

CUTLER McALLISTER, *Clerk.*

Indorsed: Filed Jan'y 23, 1861.

CUTLER McALLISTER, *Clerk.*

351 *Order.*

At a regular term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Wednesday, the 20th day of Feb'y, in the year of our Lord one thousand eight hundred and 61.

Present, the honorable M. Hall McAllister, judge of said court.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL CO. *et al.* } In equity.

And now at this day come the parties to this cause, by their respective attorneys and solicitors, and on motion of solicitor for complainant, it is ordered that this cause be continued for the term.

Indorsed: Filed this 20th day of Feb'y, 1861.

CUTLER McALLISTER, *Clerk.*

352 *Order.*

At a regular term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Monday, the 12th day of August, in the year of our Lord one thousand eight hundred and sixty-one.

Present, the honorable M. Hall McAllister, judge of said court.

GEORGE GORDON
vs.
S. F. CANAL CO. *et al.* } In equity.

And now at this day, on motion of solicitor for complainant, it is ordered that this cause be set for hearing Monday next, Aug. 19, 1861.

Indorsed: Filed this 12th day of Aug., 1861.

CUTLER McALLISTER, *Clerk.*

353 *Order.*

At a regular term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Monday, the 19th day of Aug., in the year of our Lord one thousand eight hundred and sixty-one.

Present, the honorable M. Hall McAllister, judge of said court.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. *et al.* } In equity.

And now at this day it was ordered that the hearing of this cause be continued until to-morrow.

Indorsed: Filed this 19 day of August, 1861.

CUTLER McALLISTER, *Clerk.*

354 *Order.*

At a regular term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Tuesday, the 20th day of Aug., in the year of our Lord one thousand eight hundred and sixty-one.

Present, the honorable M. Hall McAllister, judge of said court.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. *et al.* } In equity.

And now at this day come the parties to this cause, by their respective solicitors, and it is ordered by the court that this cause, heretofore set for to day, be continued for the term.

Indorsed: Filed this 20th day of Aug., 1861.

CUTLER McALLISTER, *Clerk.*

355 *Order.*

At a special term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Monday, the 7th day of April, in the year of our Lord one thousand eight hundred and sixty-two.

Present, the honorable M. Hall McAllister, judge of said court.

GEORGE GORDON
vs.
THE SOUTH . } In equity.

And now at this day, on motion of Sol. Sharp, esq'r., solicitor for complainant, J. B. Crockett, esq., d'f'ts' solicitor, consenting thereto, it is ordered that this cause be set for trial for Thursday, the 17th day of April, 1862, subject to def'ts' right to show cause at that time why this action is not ready for trial.

Indorsed: Filed this 7th day of April, 1862.

HENRY C. HYDE, *Clerk.*

356 *Notice.*

In the circuit court of the United States in and for the district of California.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL COMPANY *et al.*

Messrs. Crockett & Crittenden, att'ys for defendants:

GENTLEMEN: You will please take notice that on Monday next, the seventh day of April instant, at the opening of the court on that day,

or as soon thereafter as counsel can be heard, we will move the court to set this cause down for hearing at some day, certain, to be fixed by the court.

San Francisco, April 1st, 1862.

Resp'lly, &c.,

McDOUGALL & SHARP,
Att'ys for Pl'ff.

Indorsed: Service of a copy of the within notice admitted, this 1st day of April, 1862.

CROCKETT & CRITTENDEN,
Att'ys for Def'ts.

Filed April 7, 1862.

HENRY C. HYDE, *Cl'k.*

357 *Stipulation.*

United States circuit court, northern district of California.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL COMPANY *et al.*

It is hereby stipulated that Caroline Robinson, administratrix of Thomas Robinson, dec'd, may and does hereby appear and adopt the answer of Thomas Robinson in said cause, as and for the answer of the said Caroline, administratrix as aforesaid, and that an order be entered in said cause to that effect.

McDOUGALL & SHARP,
Solicitors for Compl't.

C. M. ROBERTSON,
Administratrix of the estate of Thomas Robertson, deceased.

Indorsed: Filed April 15th, 1862.

HENRY C. HYDE, *Clerk.*

358 *Order.*

At a special term of the circuit court of the United of America for the district of California, in and for the northern district, held at the court-house in the city of San Francisco, on Thursday, the 17th day of April, in the year of our Lord one thousand eight hundred and sixty-two.

Present, the honorable Ogden Hoffman, U. S. district judge.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. *et al.* } In equity.

And now at this day, on motion of Sol. Sharp, esq., complainant's solicitor, and with the consent of Crittenden, esq., solicitor for defendants, it is ordered that this cause be set for hearing for Thursday, the 24th day of April, A. D. 1862.

Indorsed: Filed this 17th day of April, 1862.

HENRY C. HYDE, *Clerk.*

359 *Order.*

At a special term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Thursday, the 24th day of April, in the year of our Lord one thousand eight hundred and sixty-two.

Present, the honorable Ogden Hoffman, U. S. dist. judge.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL COMPANY *et al.* } In equity.

And now at this day come the parties to this cause, by their respective solicitors, and, on reading the disclaimer of Lewis B. Harris, one of the defendants in this cause, and, on motion of Crittenden, esq., defendants' solicitors, and, no objection being made thereto, it is ordered that said disclaimer be filed, and that this action be dismissed as to the said defendant Lewis B. Harris. And now at this day it is further ordered, by consent of parties, that the hearing of this cause be, and the same hereby is, continued until Thursday next, the first day of May, A. D. 1862.

Indorsed: Filed this 24th day of April, 1862.

HENRY C. HYDE, *Clerk.*

360 *Stipulation.*

In the circuit court of the United States of America for the districts of the State of California.

GEO. GORDGN, compl't,
vs.
THE SOUTH FORK CANAL COMPANY *et al.* }

It is hereby stipulated that J. Q. Lisle, surviving administrator of the estate of Daniel J. Lisle, who was a party to the above-entitled suit, will and does appear as a party to said suit, in his representative capacity aforesaid, and that the said representative adopts, and the same is to be so held and treated, as his answer in said cause the answer heretofore made and now on file, by the defendant, the South Fork Canal Company.

April 19, A. D. 1862.

JOHN Q. LISLE,
Administrator of the Estate of D. J. Lisle.
McDOUGALL & SHARP,
Sol'rs for Compl't.

Indorsed: Filed April 24, 1862.

HENRY C. HYDE, *Clerk.*

361 *Disclaimer.*

In the circuit court of the United States for the district of California, in and for the northern district of California.

GEORGE GORDON
vs.
SOUTH FORK CANAL COMPANY and OTHERS.

The defendant Lewis D. Harris comes, and, by leave of the court, files this his supplemental answer to the plaintiff's bill of complaint, and says that since the filing of his answer herein he has been divested of all interest in the said South Fork canal by the judgment of a court of competent jurisdiction, and he now disclaims all interest therein, and in the subject-matter of this suit, and prays to be hence dismissed.

CROCKETT & CRITTENDEN,
Att'ys for Harris.

It is agreed that the foregoing answer may be filed without being sworn; it is admitted that the statements therein contained are true; and it is agreed that the suit be dismissed as to the defendant Harris without costs.

San Francisco, April 24, 1862.

362 McDOUGALL & SHARP,
Sol'r for Compl't.

Indorsed: Filed April 24, 1862.

HENRY C. HYDE, *Clerk.*

Replication.

Circuit court of the United States for California, northern district.

GEORGE GORDON, complain't,
vs.
THE SOUTH FORK CANAL COMPANY *et al.*, defendants.

Replication of George Gordon, complainant, to the answer of A. T. Taylor, one of said defendants.

This repliant, saving and reserving unto himself all and all manner of advantage of exception to manifold insufficiencies of said answer, for replication thereunto says that he will aver and prove his said bill to be true, certain, and sufficient in the law to be an-
363 swered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct; and humbly prays as in and by his said bill he has already prayed.

McDOUGAL & SHARP,
Sol'r for Compl't.

Indorsed: Filed April 24, 1862.

HENRY C. HYDE, *Clerk.*

359 *Order.*

At a special term of the circuit court of the United States o America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Thursday, the 24th day of April, in the year of our Lord one thousand eight hundred and sixty-two.

Present, the honorable Ogden Hoffman, U. S. dist. judge.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL COMPANY *et al.* } In equity.

And now at this day come the parties to this cause, by their respective solicitors, and, on reading the disclaimer of Lewis B. Harris, one of the defendants in this cause, and, on motion of Crittenden, esq., defendants' solicitors, and, no objection being made thereto, it is ordered that said disclaimer be filed, and that this action be dismissed as to the said defendant Lewis B. Harris. And now at this day it is further ordered, by consent of parties, that the hearing of this cause be, and the same hereby is, continued until Thursday next, the first day of May, A. D. 1862.

Indorsed: Filed this 24th day of April, 1862.

HENRY C. HYDE, *Clerk.*

360 *Stipulation.*

In the circuit court of the United States of America for the districts of the State of California.

GEO. GORDGN, compl't,
vs.
THE SOUTH FORK CANAL COMPANY *et al.* }

It is hereby stipulated that J. Q. Lisle, surviving administrator of the estate of Daniel J. Lisle, who was a party to the above-entitled suit, will and does appear as a party to said suit, in his representative capacity aforesaid, and that the said representative adopts, and the same is to be so held and treated, as his answer in said cause the answer heretofore made and now on file, by the defendant, the South Fork Canal Company.

April 19, A. D. 1862.

JOHN Q. LISLE,
Administrator of the Estate of D. J. Lisle.
McDOUGALL & SHARP,
Sol'rs for Compl't.

Indorsed: Filed April 24, 1862.

HENRY C. HYDE, *Clerk.*

361 *Disclaimer.*

In the circuit court of the United States for the district of California, in and for the northern district of California.

GEORGE GORDON
vs.
SOUTH FORK CANAL COMPANY and OTHERS.

The defendant Lewis D. Harris comes, and, by leave of the court, files this his supplemental answer to the plaintiff's bill of complaint, and says that since the filing of his answer herein he has been divested of all interest in the said South Fork canal by the judgment of a court of competent jurisdiction, and he now disclaims all interest therein, and in the subject-matter of this suit, and prays to be hence dismissed.

CROCKETT & CRITTENDEN,
Att'ys for Harris.

It is agreed that the foregoing answer may be filed without being sworn; it is admitted that the statements therein contained are true; and it is agreed that the suit be dismissed as to the defendant Harris without costs.

San Francisco, April 24, 1862.

362 McDOUGALL & SHARP.
Sol'r for Compl't.

Indorsed: Filed April 24, 1862.

HENRY C. HYDE, *Clerk.*

Replication.

Circuit court of the United States for California, northern district.

GEORGE GORDON, complain't,
vs.
THE SOUTH FORK CANAL COMPANY *et al.*, defendants.

Replication of George Gordon, complainant, to the answer of A. T. Taylor, one of said defendants.

This repliant, saving and reserving unto himself all and all manner of advantage of exception to manifold insufficiencies of said answer, for replication thereunto says that he will aver and prove his said bill to be true, certain, and sufficient in the law to be an-
363 swered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct; and humbly prays as in and by his said bill he has already prayed.

McDOUGAL & SHARP,
Sol'r for Compl't.

Indorsed: Filed April 24, 1862.

HENRY C. HYDE, *Clerk.*

364 *Order.*

At a special term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Thursday, the 1st day of May, in the year of our Lord one thousand eight hundred and sixty-two.

Present, the honorable Ogden Hoffman, U. S. district judge.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL COMPANY *et al.* } In equity.

And now at this day come the parties to this cause, by their respective solicitors, and on motion of J. B. Haggin, representing certain defendants, it is ordered that the hearing of this cause be, and hereby is, continued until Monday next, the fifth day of May, A. D. 1862.

Indorsed: Filed this 1st day of May, 1862.
HENRY C. HYDE, *Clerk.*

365 *Notice.*

In the circuit court of the United States for the districts of California, in and for the northern district.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL CO. *et als.* }

The complainant will please take notice that on Monday, the 5th of May, 1862, at the opening of said circuit court, or as soon thereafter as counsel can be heard, we shall move the court for an order requiring the complainant in the above-entitled cause to amend his bill of complaint, so as to make James M. Reynolds, administrator of the estate of Walter W. Reynolds, a party defendant therein, and for such other order or orders as may be required or requisite to enable the said petitioner, the said James M. Reynolds, administrator as aforesaid, to be heard in defence of his rights in the subject-matter of said cause; and at the same time we shall suggest to the said court that John Hume is a necessary and proper party complainant in said cause, as assignee of the subject-matter of said cause, as set
366 up by complainant, said motion being based upon the accompanying petition and affidavits, and the papers on file in this cause.

BALDWIN & HAGGIN,
Solicitors for Petitioner.
JAMES M. REYNOLDS,
Adm'r of est. W. W. Reynolds.

To Messrs. McDOUGALL & SHARP and
JOHN HUME, *Solicitors for Compl't.*

Petition.

In the circuit court of the United States for the districts of California, in and for the northern district, in equity.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL CO. *et als.*

To the hon'le the judge of said court:

367 The petition of James M. Reynolds, executor of the estate of Walter W. Reynolds, deceased, respectfully showeth, that he is a citizen of the State of California and of the United States, and is interested in the subject-matter of the above-entitled cause as such adm'r; that at the time of the institution of said cause the defendant Daniel J. Lisle and John Kirk were the owners of three-fifths of the said South Fork canal and of the franchises, rights, interests, and property appertaining thereto, as appears of record, claiming the same adversely to the complainant; that during the pending of said cause, the interest so held by said Lisle and Kirk was duly and legally transferred and conveyed to his said intestate, Walter W. Reynolds, in his lifetime; that afterwards and during the lifetime of the said Reynolds, Lewis B. Harris, by virtue of certain legal proceedings in the courts of said State of California, obtained the possession and control of said interest in said canal, and being so possessed, together with one Thomas S. Sunderland and one Thomas Robert-

368 son, filed his petition in this cause setting forth the grounds therefor, and praying, together with said Sunderland and Robertson, to be made party defendant in said cause; and thereupon such proceedings were had that afterwards, on the 11th day of October, 1858, it was ordered that complainant do amend his bill of complaint in such form as to make the said Harris, Sunderland, and Robertson defendants therein, which said petition of the said Harris, Sunderland, and Robertson, filed in this court on the 11th of October, 1858, and order thereupon made on the same day, and here referred to for greater certainty, and prayed to be made and taken as a part hereof; that accordingly said Harris was made a party defendant in said cause and was permitted to come in, and did come in and defend said cause, and yet is a party defendant in the same. That on the 11th day of November, 1858, the said Walter W. Reynolds departed this life intestate, and on the 16th day of March, 1859, your petitioner was duly and legally appointed administrator of his said estate by

369 the probate court of the county of Eldorado; that since the said Harris was made a party defendant in said cause such proceedings have been had in the courts of this State, and between the said Harris and said intestate in his lifetime, and your petitioner since, by which your petitioner, as adm'r as aforesaid, has become invested and repossessed of said interest in said canal, and is now in possession, holding and claiming the same as such administrator for the use and benefit of the estate of the said Walter W. Reynolds, and which interest he holds and claims adversely to the complainant.

And he denies that the same is in any manner subject to the pretended and alleged lien of the complainant.

And your petitioner further states that he is informed, and verily believes the same to be true, that recently the said complainant and the defendants in said cause, or such of them as have any interest in the property sought to be affected thereby, have compromised
370 and settled the same, and their adverse interests, to the extent of the remaining two-fifths thereof not held or claimed by this petitioner, so that if said complainant obtains a decree enforcing his lien upon said South Fork canal, the only part or interest therein to be affected thereby is that of your petitioner, and that said Harris is about to enter a disclaimer to any interest in said property, or in the cause of action in said cause, and pray the same to be dismissed as to him, leaving the interest of your petitioner to be prejudiced and jeopardized in said cause.

And your petitioner also further states that he is informed and believes, and upon such information and belief states and shows, that the complainant, George Gordon, has now no real interest in the subject-matter in this cause, or in the claim sought to be enforced therein, but that the same is now owned, held, and claimed by one John Hume and one Charles Hosmer, under and by virtue of certain assignments and transfers made, mediately or immediately, by
371 the said complainant to them severally; and that so far as the interest of the said Hosmer is concerned, it is the same and no other interest than that which has been settled and compromised by and between the said complainant and the said defendants, as hereinbefore stated; and that said Hume remains the only real party in interest in said cause, and as the equitable assignee thereof is the only party entitled to direct and control the conduct of said cause on the part of complainant; and the said Hume consents that the prayer of your petitioner may be granted.

Inasmuch, therefore, as the complainant seeks in his said bill in this cause to subject your petitioner's interest in the said canal to his alleged demand and lien, your petitioner is advised by counsel that, in order to protect his said interest, it is necessary and proper he should be made party defendant in said cause, and be permitted to come in and defend the same; that he has a good and valid defence to the relief sought by complainant in his bill of complaint, upon the papers filed in said cause.

372 Wherefore your petitioner prays that he be made a party defendant in said cause, and that the complainant be required to amend his said bill of compl't for that purpose.

And he further avers that this application is not made for vexation or delay, but for the ends of substantial justice.

J. M. REYNOLDS.

Subscribed and sworn to before me this 1st day of May, A. D. 1862.

[SEAL.] HENRY HYDE, *Clerk*.

373 *Affidavit.*

In the circuit court of the United States for the districts of California, in and for the northern district.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL CO. *et als.*

The affidavit of David B. Milne, he being first duly sworn, says: That in the spring of 1858, the complainant, George Gordon, assigned and transferred the claim and demand set up in his bill of complaint in this cause, and the lien asserted by him upon the South Fork canal in said bill of complaint, to F. D. Kohler, and that afterwards said Kohler, on the fourth day of October, 1859, assigned and transferred three-fifths of said demand and of said lien to John Hume, of Placerville.

D. D. MILNE.

Sworn to and subscribed before me this 2d day of May, A. D. 1862.

[SEAL.] W. C. PARKER, *Notary Public.*

374 *Affidavit.*

In the circuit court of the United States for the districts of California, in and for the northern district.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. *et als.*

John Hume, being duly sworn, says that he is one of the solicitors in this cause on the part of complainant, and that he is also the owner and holder, by assignment, of three-fifths part of the claim and demand sought to be enforced in this cause, and in the lien set up and claimed by complainant in his bill; that the said complainants, on or about the day of , 1858, assigned and transferred to one F. D. Kohler his said claim and lien in said bill of complaint set up; and afterwards, on the 11th day of October, 1859, the said Kohler, then being the owner and entitled to the same by virtue of said assignment, duly assigned and transferred to affiant the
375 ⅗ths of said claim and lien, a copy of which assignment and transfer is hereto annexed for greater certainty; that he has read the petition of James M. Reynolds, adm'r of W. W. Reynolds, dec'd, praying to be made a party defendant in said cause, and he here consents that the prayer of said petitioner may be granted.

JOHN HUME.

Subscribed and sworn to before me this 2d day of May, A. D. 1862.

HENRY C. HYDE, *Clerk.*

376 Know all men by these presents that I, Frederick D. Kohler, of the city and county of San Francisco, State of California, for and in consideration of the sum of one dollar to me in hand paid by John Hume, of the city of Placerville, county of Eldorado, State aforesaid, the receipt whereof is hereby acknowledged ; and in further consideration of the agreement on the part of said Hume that he will take, and cause to be taken, all the depositions and testimony which are necessary to be taken, and procure the attendance of all the witnesses whose attendance may be deemed material, at the trial of the cause now pending in the circuit court of the United States, at San Francisco, entitled George Gordon *vs.* The South Fork Canal Company, and will be at all the expense and charges of taking such depositions and testimony and procuring the attendance of said witnesses, have bargained, sold, conveyed, and transferred, and by these presents do bargain, sell, convey, and transfer to said John Hume the three-fifths
377 interest in and to the claim or demand of the said George Gordon against the said South Fork Canal Company, sued on in the said suit, and heretofore assigned by the said Gordon to the said Kohler, and amounting originally to about the sum of one hundred and six thousand dollars. Also, a like interest in the lien filed by said George Gordon upon the South Fork canal in Eldorado county, and all rights, remedies, and means of collection which ever were of the said Gordon, with full power to proceed to the collection of said sum of money, claim, and demand, in his own name or otherwise : provided, that whereas the one-third part of the said claim of the said Gordon is still held by the said Gordon as security for a certain promissory note for the sum of five thousand dollars made by said Kohler, and being part of the consideration for the purchase of the said claim by the said Kohler from the said Gordon, it is un-
378 derstood and agreed that the said note and interest shall be a charge against the entire interest and claim of the said Gordon in said suit.

In witness whereof, we have each hereto set our hands and seals in duplicate this eleventh day of October, A. D. 1859.

(Signed) F. D. KOHLER. [SEAL.]
JOHN HUME. [SEAL.]

Attest : J. A. McDOUGALL.

Indorsed : Service of the within papers admitted May 2, 1862.—Filed May 5, 1862.

HENRY C. HYDE, *Clerk.*

379 *Affidavit.*

Circuit court of the United States for the district of California, in and for the northern district.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL CO. *et al.*

CITY AND COUNTY OF SAN FRANCISCO, *ss :*

George Gordon, being duly sworn, deposes and says that he is the

complainant above named, and says that he has heard read the petition of James M. Reynolds, administrator of Walter W. Reynolds, and the affidavits of D. D. Milne and John Hume thereto annexed, and this affiant says it is not true, as stated in said petition and affidavits, that this affiant, in the year 1858, sold or assigned the claim and demand or lien described in said bill of complaint to F. D. Kohler; that he did not assign the same, or any part thereof, to said Kohler, as stated in said petition and affidavits, but did
380 enter into an executory agreement for the sale and purchase of said claim, demand, and lien with said Kohler; that said Kohler failed and neglected (although often requested) to comply with the said agreement on his part, and being wholly unable to comply therewith, surrendered and relinquished said agreement to this affiant; and this affiant afterwards, to wit, on or about the 31st of December, A. D. 1861, sold and assigned said claim, demand, and lien to Charles Hosmer by absolute assignment thereof in writing; that this affiant never knew, or was informed, or had any notice of any assignment by said Kohler, or any other person, of said claim, demand, or lien, or any part thereof, until so informed by said petition and affidavits; that this affiant never engaged or authorized the employment of John Hume, esq., as one of the solicitors for
381 complainant in said cause; and that, so far affiant knows, no person, except said Hosmer and his solicitors, have any right to control or manage said cause on the part of complainant.

GEO. GORDON.

Subscribed and sworn to before me on this 5th day of May, 1862.
[SEAL.] P. B. CORNWALL, *Notary Public.*

Indorsed: Filed May 5th, 1862.

HENRY C. HYDE, *Clerk.*

Affidavit.

Circuit court of the United States for the district of California, in and for the northern district.

GEO. GORDON, plaintiff,
vs.
THE SOUTH FORK CANAL COMPANY *et als.*, def'ts.

382 STATE OF CALIFORNIA, *City and county of San Francisco:*

Charles Hosmer, being of lawful age and duly sworn, deposes and says, that he is the sole owner and holder of all and singular the claim and lien of the complainant in this cause against the defendants therein, as the same is set forth and exhibited in the bill of complaint in this cause, together with all and singular the interests, rights, benefits, and advantages growing out of, or arising therefrom, by absolute assignment thereof in writing from said complainant to this affiant. That affiant paid a good, valuable, full, and sufficient consideration therefor, and purchased on the 31st day of December, A. D. 1861,

and now holds the same from said complainant in good faith. That affiant, before purchasing the same as aforesaid, never knew or was informed, or had any notice of any assignment of said claim or lien, or any portion thereof, by said complainant to F. D. Kohler,
383 or to any other person, or by said Kohler to John Hume, or any other person.

Affiant denies that said John Hume is the owner or holder of three-fifths of said claim and lien, but on the contrary affiant says that said Hume has no interest whatever in said claim or lien, or in any part thereof. And affiant is informed and verily believes, and so states, that said Hume is not now and never was one of the solicitors of said complainant, and was never employed as such by said complainant or by authority of said complainant.

On information and belief affiant denies that said complainant, on the day of , 1858, assigned or transfarred to F. D. Kohler the said lien or claim, or any part thereof.

Affiant further states that he is informed, and believes the same to be true, that neither the said James M. Reynolds, administra-
384 tor, &c., nor the estate of Walter W. Reynolds, have any interest whatever in or to the canal or property mentioned in the bill of complaint in this cause, but that the interest claimed to have been assigned by Daniel T. Lisle to W. W. Reynolds, and now claimed as the property of the estate of said W. W. Reynolds by the said administrator, was held by the said Lisle and said W. W. Reynolds, and now by said administrator, in trust for one John Kirk, who is one of the defendants in said cause.

CHA'S HOSMER.

Subscribed and sworn to before me this 5th day of May, 1862.
[SEAL.] P. B. CORNWALL, *Notary Public.*

Indorsed: Filed May 5th, 1862.

HENRY C. HYDE, *Clerk.*

385 *Order.*

At a regular term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Wednesday, the 9th day of July, in the year of our Lord one thousand eight hundred and sixty-two.

Present, the honorable Ogden Hoffman, U. S. district judge.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL COMPANY *et al.* } In equity.

And now at this day come the parties to this cause, by their respective solicitors, into court, and the motions of J. G. Baldwin, esq., as solicitor, and on behalf of J. M. Reynolds, as administrator of the estate of W. W. Reynolds, deceased, claiming to be the successor in interest of Lewis B. Harris, for leave of the court to come in

386 and defend this action in the name of said Lewis B. Harris, and that the order heretofore made dismissing this cause as against said Harris be rescinded and set aside, and that said Reynolds be made a party defendant in said cause, and that the complainant be required to amend his bill of complaint in that respect, and that said Reynolds be permitted to come in and defend said action, heretofore, to wit, on the 5th day of May, A. D. 1862, argued and submitted to the court, having been duly considered, it is ordered that said motions, and each and all of them be, and they are hereby, denied.

Indorsed: Filed this 9th day of July, 1862.

HENRY C. HYDE, *Clerk.*

Order.

At a regular term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Wednesday, the 9th day of July, in the year of our Lord one thousand eight hundred and sixty-two.

387 Present, the honorable Ogden Hoffman, U. S. district judge.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL COMPANY *et al.* } In equity.

And now at this day, on motion of J. B. Haggin, esq., and on reading and filing the written stipulation of Messrs. Crockett and Crittenden, solicitors for the South Fork Canal Company, defendants herein, it is ordered that Messrs. Baldwin and Haggin be substituted as solicitors for said South Fork Canal Company, defendants, and that said last-named defendants be allowed one week from this day to introduce further documentary proofs on their part in this cause, and that all proofs on the part of said company shall be closed within said time.

Indorsed: Filed this 9th day of July, 1862.

HENRY C. HYDE, *Clerk.*

388 *Substitution.*

Circuit court of U. S. dist's of California, in and for northern dist.

GEORGE GORDON
vs.
S'H FORK CANAL CO. *et als.* }

Messrs. Baldwin, Haggin and Miller are hereby substituted as solicitors for the def't, the So. Fork Canal Co., in the above-entitled action, in place of Messrs. Crockett & Crittenden, sol's of record.

South Fork Canal Co., by—

O. HARNEY, *President.*

We consent to the substitution of Messrs. Baldwin & Haggin and M. as solicitors for the South Fork Canal Company.

San Francisco, July 9th, 1862.

CROCKETT & CRITTENDEN.

Indorsed: Filed July 9th, 1862.

HENRY C. HYDE, *Clerk*.

389 *Order.*

At a regular term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Monday, the 4th day of August, in the year of our Lord one thousand eight hundred and sixty-two.

Present, the honorable Ogden Hoffman, U. S. district judge.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL COMPANY *et al.* } In equity.

And now at this day, on motion of Solomon Sharp, esq., solicitor for complainant, it is ordered that this cause be set for hearing for Wednesday, the 13th day of August, A. D. 1862.

Indorsed: Filed this 4th day of August, 1862.

HENRY C. HYDE, *Clerk*.

Order.

At a regular term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Wed-
390 nesday, the 13th day of August, in the year of our Lord one thousand eight hundred and sixty-two.

Present, the honorable Ogden Hoffman, U. S. dist. judge.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL COMPANY *et al.* } In equity.

And now at this day came the parties to this cause, by their respective solicitors, into court, and Sol. Sharp, esq., complainant's solicitor, moving said cause for hearing, defendants' solicitor objected thereto, and it is ordered that said cause be, and hereby is, continued for the present.

Indorsed: Filed this 13th day of August, 1862.

HENRY C. HYDE, *Clerk*.

391 *Deposition of John Hume.*

Circuit court of the United States for the districts of California, in and for the northern district.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. *et als.*

PLACERVILLE, *Jan'y* 21, 1860.

Be it remembered that on this 21st day of January, A. D. 1860, personally appeared before me, Cutler McAllister, a commissioner appointed by the circuit court of the United States for the districts of California, under the laws of the United States, to take affidavits and acknowledgments of bail, &c., &c., John Hume, to testify and the truth to say on the part and behalf of the compl'ts, in a certain suit or matter of controversy now depending and undetermined in the abovenamed court, between the abovenamed parties; and the said witness, being of lawful age, and having been by me first cau-
392 tioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, did thereupon depose, testify, and say as follows, viz:

Present: John Hume for compl't; S. W. Sanderson for def't.

Questions by sol'r for compl't:

Ques. 1. Your name, age, and place of residence?

John Hume; am 35 years of age; reside in Placerville. On the 6 or 7th of June, 1853, I went to the pres't and directors of the South Fork Canal Co., then in session, and demanded or them the sum due Gordon & Kinyon on the June estimate, on behalf of Gordon & Kinyon. I made the demand by the request of Gordon & Kinyon. I think the whole amount of the estimate was some $15,800 and
393 something.

A sum of money amounting to 4,000 had been paid to Gordon & Kinyon on the estimate; I demanded the balance, whatever it was, for Gordon & Kinyon; they replied to me that they did not have the money at that time, but would have it in a few days, and informed me that they were then making an effort to raise the money. I informed them, upon non-payment, that Mr. Gordon abandoned the contract.

I then delivered to the company a letter from Gordon & Kinyon, of which the exhibit marked Exhibit "A," attached to my deposition, is a true copy, with the exception that the original letter was signed in full by Gordon & Kinyon. The pencil note in the copy was not in the original letter, but has been put there by Mr. Gordon, since the delivery of the original. I think I delivered the original about 4 p. m. of the 7th June. Some week or ten days afterwards I delivered to the South Fork Canal Co. a letter from Gordon & Kinyon, dated June 13, 1853, of which Exhibit B, attached to my de-
394 position, is a copy.

A day or two after the delivery of the first letter "Ex. A," Mr. C. C. Batterman, sec'y of the S. F. C. C., after dark of that day, came to me upon the sidewalk; he had with him what appeared to

be a purse of money, and said he wanted to tender to me the amount due Gordon & Kinyon on the contract. I informed him that I had no authority to receive it. He then inquired where Mr. Kinyon was. I told him I did not know, and then he left me. That is all I know about it.

JOHN HUME.

Subscribed and sworn to before me this 21st Jan'y, A. D. 1860.
CUTLER McALLISTER, *Master in Equity.*

PLACERVILLE, *June* 7, 1853.

To the directors and officers of the South Fork Canal Co.:

GENTLEMEN: By the terms of our contract with you, we were to be paid 80 per cent. of the value of the work done under it, at
395 that contract, monthly.

We have presented our bill on the 7th of June for the work done in May, and the amount has not been paid.

We now beg to give *give* notice that the conditions of the contract not having been complied with in this its most important particular, we declare it annulled, at an end, and that we are no longer parties thereto.

In making this announcement we beg to acknowledge our obligations to the directors and officers of the company for their personal kindness, attention, and courtesy; we wish to acknowledge this in the strongest terms—it is impossible to desire more personal consideration.

We wish also to say that we feel attached to and greatly interested in the noble enterprise which they direct, and more especially feel pride in our contract from the very difficulty of its execution, and its importance relatively to the whole work.

Actuated by these motives, we wish in a frank and, we trust, in a considerate manner to say—

1st. That this communication is strictly confidential, one
396 person only (John Hume, esq.,) besides ourselves being cognizant of it until it reaches your hands.

2d. That we will, for six days longer from this date, continue the work undertaken by us at our own risk, and shall not ask for pay beyond this date, unless the company choose, from their own sense of honor, to pay us, and this for the purpose of allowing the company to make other arrangements without interrupting the work. And

3d. Although this abrupt termination of our contract will involve to us a loss of $40,000 expended in machinery, wages, and for general purposes, we shall claim no damages, but leave the settlement to the company's sense of right and justice, asking payment only for the work done to the evening of the 7th.

We simply terminate the contract from the fear that the company will allow us to make excessive expenditures, and then leave us embarrassed by their want of punctuality in payments.

We value this work, we value the profits of our contract, but our credit is still more valuable to us, and this to-day has been

397 jeopardized and injured by the company's inability to pay us, and our consequent inability to pay our men, to whom we had assembled by public notice, announced our readiness to make all payments due to them on this day.

We have expended of our own resources on this contract $37,770. We remain at this date indebted on this work to others to the extent of $29,000 more.

We have, in the face of the great physical difficulties of the work, and embarrassed by the bad credit of the company amongst workmen, completed a large and spirited amount of preparation and of actual work. This will be acknowledged by all who have visited our work.

But the company cannot expect two private persons to be at once the artisans and the paymasters of a large work, and to bear the financial burdens which a company of some hundreds of stockholders contracted to bear.

We therefore respectfully but firmly decline our contract, to avoid embarrassment and discredit to ourselves, and, at the end of six days, shall discontinue the work, unless a new and secure financial
398 arrangement be made, satisfactory to us, or such as your own directors, Mr. Church and Mr. De Roe, will pronounce to be convenient, secure, and proper.

G. G. & K.

NOTE.—This letter not having been noticed, the whole of it was withdrawn by our letter of 13th June, presented by John Hume.

Exhibit B.—C. McA.

B

JUNE 15, 1853.

To the president and officers of the South Fork Canal Co.:

GENTLEMEN: In our letter to you of 7th June, delivered by Mr. Hume, I offered sundry advantages to you, such as a waiver of damages of amount of work done, was paid for, &c., continuing the work six days to give you opportunity to arrange with us or our men, in case you did not want the work interrupted.

No action having been taken or answer given to that letter, and the six days having expired at 4 p. m. to-day, we beg to withdraw the whole of it, except that part which declares our contract broken, nullified, and ended, and do withdraw it accordingly.

399 The offers and declarations contained therein were voluntary, and having met with no response, it is competent for us to withdraw them, and leave our position exactly as though they had not been written.

It would be exceedingly desirable if the directors wish to continue the work that they should determine about the men. Our credit has received such a shock by our checks being dishonored and our money delayed and refused, that we cannot possibly con-

tinue either to hire or feed them without the means in hand to pay them.

We are your ob't s'v't,

GEO. GORDON,
For GEO. GORDON & KINYON.

PLACERVILLE, *Dec. 15th*, 1853.

Geo. Gordon, esq.:

D'R SIR: Our district court has been in session at Coloma for three weeks past, and I have been there in attendance upon it; therefore your letter of Nov. 29 was only rec'd by me on my return to-day.

I had supposed that Montgomery had entered satisfaction of
400 judgment long since. If for any reason it has not been done, I will see that it is done at once.

The deed of Nye & De Long mill, from Robinson to you, is in the recorder's office at Coloma, for record, and has been for some time. I will get it sent over at once, and will forward it to you.

I very well recollect that in your letter to the S. F. C. Co., of June 13th, you withdrew the advantages which you had offered by your letter of June 7, I noted the contents as requested by you. Enclosed please find a copy of the letter which I took at the time.

Very truly, yours,

JOHN HUME.

Indorsed: Filed Feb'y 1, 1860.

CUTLER McALLISTER, *Clerk.*

401 *Deposition of James S. Law.*

Circuit court of the United States for the districts of California, in and for the northern district, in equity.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. *et al.*

PLACERVILLE, *Jan'ry* 19, 1860.

Be it remembered, that on this 19th day of January, A. D. 1860, personally appeared before me, Cutler McAllister, a commissioner appointed by the circuit court of the United States for the districts of California, under the laws of the United States, to take affidavits and acknowledgments of bail, &c., &c., James S. Law, to testify and the truth to say, on the part and behalf of the compl't in a certain suit or matter of controversy now depending and undetermined in the abovenamed court, between the abovenamed parties; and the said witness, being of lawful age, and having been by me first cautioned and sworn to testify the whole truth and nothing but the truth in the matter of controversy aforesaid, did thereupon depose, tes-
402 tify, *as* say as follows, viz:

Present: John Hume for compl't; S. W. Sanderson for def'ts.

Questions by compl't's sol'r:

Ques. 1. Your name, age, and place of residence?

James S. Law; am 51 years of age; reside in Dutch Flats, Placer county. Am acquainted with George Gordon and Alonzo Kinyon. Was in Placerville about the time that Gordon and Kinyon quit work on the South Fork Canal Co. I think I know something about the release executed by Kinyon for Gordon & Kinyon to the South Fork canal. Kinyon came to my room, near the Eldorado Hotel, in this place, in June, 1853; he then informed me (sol'r for def'ts objects to any evidence being given in regard to any statements made by Kinyon) that he felt unpleasantly situated in regard to the contract made by Gordon & Kinyon with the South Fork Canal Company.

403 This conversation took place after he had suspended work on the canal, although he had made such a statement prior to his suspension of work. He stated in substance that he was only a partial contractor with Gordon, and had not equal rights and privileges with him; that is, that he had not an equal interest in the contract and the ultimate prosecution of that claim against the South Fork Canal Company with Gordon.

At that conversation I advised him to liberate himself from his present embarrassed condition.

I advised him to make a transfer of all the property of Gordon & Kinyon to me for a certain nominal consideration, with all the tools, mills, and everything appertaining to the work.

(Def'ts sol'r objects to all this conversation.)

404 He argued to this proposition, upon the consideration that the board of the South Fork Canal Company should make a contract with me for the completion of the work covered by his and Gordon's contract.

I was to give him, for this transfer of property, a nominal consideration, with one-third interest in the new contract to be made by me with the South Fork Canal Co. In the meantime, there being some doubt of his ability to make this transfer in my own mind, he was to go over to Carson valley and remain there until my title to said property should be perfected. This transfer was not made at the time, because we did not know whether the board of the South Fork Canal Company would make a contract with me for the completion of that portion of the canal.

We both made an attempt to obtain such contract with the South Fork Canal Company, through Mr. Kirk, our agent.

(All this testimony objected to by sol'rs for def't.)

405 Do not know what took place between the board of the South Fork Canal Company and Mr. Kirk, except what he told me, and what Mr. Kinyon told me, who had accompanied him.

I did not make the contract with the South Fork Canal Co., because Kirk told me they would not make it.

(Objected to by def'ts' sol'r.)

I had a conversation with Dr. Keene, who was at that time president of the board of directors of the South Fork Canal Co. The subject of our conversation was the contract which I desired to make for

the completion of the work with the South Fork Canal Co. He stated to me that, on the advice of their counsel, they thought it better for them to sign counter releases with Kinyon, and give him an absolute consideration for his release property. He stated that they preferred this plan on advice of their counsel, and because they did not think I had money enough to complete the work. I
406 think it was with Mr. Keene, I had this conversation. I replied that depending on my own means, that I did not think I had, but that, as contractors, we depended on the contracts being carried out and money being paid by the company upon the contracts.

We had no conversation about the proposition pending between myself and Kinyon; don't know that he had any definite knowledge of it all. I suppose that he was posted up on it. I had this conversation with Dr. Keene on Monday evening, and the releases were executed on the evening after.

I think I had it from Dr. Harney, who was a member of the board at the time, that the board had been called together to take under consideration the proposition made between Kinyon and myself.

Concerning the execution of the release, I possess no knowledge of my own, directly, but Mr. Kinyon informed me (sol'r for def'ts objects to any evidence with regard to the statements of Mr. Kinyon to
407 the witness as incompetent) that on consultation with Mr. Newell, their legal adviser, he had advised them to make the sale, and obtain the release directly from Kinyon himself. I then asked him what consideration he was going to release for. He remarked that he had offered to take $8,000 for his portion of the contract, the company also paying all his debts due for work and labor done. I asked him if he was going to transfer into the hands of the company all the property, mills, tools, &c., belonging to himself and Gordon? He said that he was not; to use his own language, he remarked to me, that Newell, the co.'s lawyer, said, "it was too base a fraud."

After the release was made, on the Wednesday following, Mr. Binney and myself went down to Sacramento city in company with Mr. Kirk, three of us. Mr. Binney talked considerably about the matter going down, and felt quite elated at the arrangement
408 made between Kinyon and the board. Stated that Kinyon had headed George Gordon, and sold him very cheap. Those were the very words he used while we were travelling some 12 miles from here. Then he said, "Mr. Law, what will Gordon think when he finds that Kinyon has gone in the steamer for the States?"

After he made the release, which was made the night before, I don't know at what hour that night, I met him and the board of directors coming out of the company's office, between 9 and 10 o'clock. At that time he publicly proclaimed, in presence of Dr. Keene, Wm. *Wm.* Smith, and Dr. Harney, "Law, I have consummated the matter, and now I am going up there to get my money," or some words to that effect.

About 20 minutes or half an hour after that, he came down to my

room and counted the money; and then told me that he had had the stock transferred to his wife or daughter, I forget which. The
409 stock he referred to was the stock of the South Fork Canal Company which was paid to him for making the release. He then counted out $2,000 in money that he had in an old stocking. He then borrowed a mule from me early next morning and started for Sacramento to go to the States. After that, about 1 or 2 o'clock the day he left here, I met him in Sacramento. We went to Smith's stable.

Kinyon was concealing himself to a certain extent; Kinyon followed us to the stable, and was very uneasy for fear that George Gordon might be in town.

He asked Mr. Kirk to go down to the Orleans Hotel, look at the register, and see if Mr. Gordon had come up in the boat the night previous. (He introduced me to Ferguson—Horse-market Ferguson.) At that time he spoke of the release, saying that it was a swindle upon George Gordon; that he regretted having done it, and
410 that if he had the whole thing to do over again he would not do it. He blamed Kirk and myself for advising him to do it.

Examination adjourned until 11 o'clock to-morrow, Jan'y 20, 1860.

PLACERVILLE, *Jan'y* 20, 1860.

Examination of James S. Law this day continued. Present, John Hume, for compl't; S. W. Sanderson for def'ts:

Have done work on sections 13, 14, 15, and 16 of the South Fork canal; section 16 adjoined the contract of Gordon and Kinyon.

I completed section 16; part of it had been done before.

Have been principally engaged during my life in contracting, doing business in public works.

Have been engaged in building ditches in California.

The first contract I made was with the South Fork Canal Company, when I made a contract with them for building sections
411 13, 14, and 15. Have been engaged in contracting from that time to this, the greater portion of my time.

I never was over the line of the work done by Gordon & Kinyon; never examined their timber.

In 1853 (the spring) I completed my contract with the South Fork Canal Company.

I think it was in May, 1853; it might have been the first of June. At that time I think Gordon & Kinyon were at work on their contract. At that time I was paying for common laborers $65 and board, and from that up to $100 and board; they paying their own board during the time they lost.

I boarded them Sundays.

At that time contractors, lower down, were paying less than I did; they were paying from 50 to 60 dollars per month, I think, but I could not get laborers for less wages than I paid.

The reason I paid such high wages was, that where I was
412 working was a little higher up the mountain, and more inaccessible for men.

Where Gordon was working it was still higher up in the mountain, and still more inaccessible to men.

Another reason that I paid such high wages was, that I draw all orders for work and labor due the men on the South Fork Canal Company, and they looked to the company for their pay.

At that time, and for several months before that, their credit was very low; they did not pay cash after the second or third estimates in 1853. I was a bidder on the first four miles of the Gordon contract at the time it was let to Gordon and Kinyon—it was not originally let to them. I think the timbers were to be of the same size as those used on my sections, the lower portion of the work.

(Def'ts' solicitor objects to any evidence with regard to the
413 credit of the company in 1852.)

I am not a mechanic, but I have bid on works in this State, and have always made my bids on the ground that when I had got my timber out and got it on the ground I considered the timber work half done.

If it costs 10 cents per foot to hew the timber out, and get it on the ground, I would be willing to put it up complete for an additional 10 cents per foot, including in this last ten cents my profits on the contract.

Because I consider that it would cost more to get the timber out and on the ground than to put it up.

I did not examine the line afterwards given to Gordon and Kinyon when I bid for the contract, but made my bid from my knowledge of the general character of the country, which I am acquainted with *it*.

In the above estimate I only include the timber and the timber work.

414 I do not now remember what my bid for grubbing and clearing that line was; I put my bid in rather high, anticipating a cash payment from the company.

I should think it would be worth from 300 to 350 dollars per mile; this depends, however, upon the engineer, who has the superintendence of the work.

The engineer may cause the contractor to go up high and cut down timber which in his opinion might fall down and destroy the flume; that is, may cause him to do unneccessary extra work.

In estimating on the grading I estimate entirely from the number of yards. Grading earth, I estimate, would cost 50 cts. per cubic yard.

Excavating hardpan would cost 80 cts. per cubic yard.

Excavating rock on that line, on the average, would be worth to the contractor from four to four and a half dollars per cubic yard.

415 I make these estimates on cash payments.

In my estimates on timber I include planking and everything necessary to the construction of that kind of work.

I don't think it would have cost Gordon and Kinyon to have got

out the plank and got it to the line of grade less than from 65 to 70 dollars per thousand feet, lineal measure.

If they had put up their own mills, and got this lumber out themselves, it might have cost them less. I can't say how much less, not knowing the profits of the sawing. In 1853 10 x 10 timber, to have got it out and put it along the line of the grade, I consider, would have cost from 20 to 25 cents per lineal foot.

5 x 6 timber, such as was used for brace timber, to have got it out and along the grade, would have cost 7 to 8 cents per foot, lineal measure.

To get out the sawed timber, posts and caps, would, I think,
416 have cost the same as brace timber.

I know that in the spring of 1853 the company were unable to pay the orders that I gave on them.

I was in the office of the company frequently, and had considerable business with them, not daily or weekly, but as business called me down here from my work.

They were largely in debt at that time. Can't tell the precise amount. I should say it was considerably over one hundred thousand dollars. At the time Kinyon entered into the contract with George Gordon, I knew from him that he was not worth a dollar.

(Def'ts' sol'r objected to this evidence as incompetent.)

In 1852 these sections 13, 14 and 15 were let to me under contract; Kinyon came to me obtain a sub-contract for the completion of these sections. I knew him in the States before he came here.
417 I inquired as to his pecuniary condition here, and was informed by one or two men that he had some money. John Hume was one of them, if I mistake not.

On that representation I contracted with him for the completion of sections 13 and 14, reserving section 15 for myself.

I found that I was disappointed in his pecuniary circumstances. He had no money, and I had to assume his indebtedness; that assumption and payment was made by an order on the South Fork Canal Co. I had a conversation with a member of the board of directors of the South Fork Canal Co.—do not remember which one—with regard to the pecuniary condition of Kinyon at the time he took the contract with Gordon. I think it must have been Dr. Keene, as I was more acquainted with him than with any other member. My conversations were generally with him. We served together at the
418 same time in the legislature.

The conversation was with regard to Gordon and Kinyon's power to fulfil the contract.

I have had repeated conversations with the directors of the company, and the general impression was that Kinyon was worth nothing, and that they looked to Gordon for the fulfilment of their contract.

I had a conversation with Binney relative to the contract with Gordon and Kinney; he stated that the company had a contract with Gordon and Kinyon, which Gordon and Kinyon could not comply with.

I asked him why they could not. He stated that the time was too

limited, and that George Gordon would have to meet the expenses himself; that he had the estimating, and would make such estimates as the company could meet.

I asked him what rule he would estimate on to cut down the
419 estimates; his answer was, that he was going to take the estimates strictly on the day required in the contract, or have it taken; and that he would estimate nothing that was not delivered right along the line of the work. That he should do so, so as to enable the company to raise the money to meet the estimates.

This conversation was some 8 or 10 days prior to the making of Gordon's second estimate.

(Def'ts' sol'r objects to all the testimony in regard to the estimates which are laid down in the written contracts.)

Estimating timber or lumber lying beyond the line of the grade in public works depends upon circumstances altogether. If an engineer has confidence in the ability, &c., of the contractor, he will measure materials for the work outside; if he has not, he will not do it,
420 and it is a matter which rests in the breast of the engineer altogether.

I cannot say from any assertion on their part to me that any of the directors of the South Fork Canal Co. had any impression at the time of the release by Kinyon that it was Kinyon's intention to leave the State.

Cross-examination:

Mr. Gordon and I had a conversation with regard to these matters in San Francisco in 1853 or 1854. I made no disclosures to him that I recollect of. I never at any disclosed the facts I have testified to to Mr. Gordon, the complainant. I was solicited to come here as a witness by Mr. Hume, through Mr. Kirk. No inducements were held out to me to come. I told Mr. Kirk I could not come unless my expenses were paid. Do not know whether Mr. Kirk has any interest in tis suit; he has told me that he had not. Don't know that
421 he has told me anything to lead me to think he had. Never told Capt. Smith that he (Kirk) said he had. I might have told Capt. Smith and others that I believed he had an interest in this suit. My opinion is that he has a pecuniary interest in the prosecution of this claim. (Sol'r for compl't objects to any evidence with regard to the opinion of the witness; also because this is not a cross-examination.)

I form this opinion from Kirk's action in the case, coming after me as a witness and agreeing that my expenses should be paid. I never told Capt. Smith that Kirk, I believed, had a two-third interest in this claim.

Have disclosed the facts I have just testified to to Mr. Gay and Mr. Strobridge.

In 1853 or 1854, in the Orleans Hotel, in Sacramento, in the
422 bar-room, at 9 o'clock one night, Kirk, myself, and Williams, I think—the present att'y gen'l—were present; we were both under the influence of liquor; Sunderland was there also.

Kirk remarked to me, "Law, they are trying to cheat me out of

everything; you know of the rascally transfer between Kinyon and the board, and rather than see them succeed I would leave the whole thing go to hell," or something to that effect.

I observed that I did know something about the transfer. He did not at that time, nor at any time that I know of, say that he was going to use this case as the means of getting even. Kirk is not indebted to me; I have no legal claims against him.

There was an honorable debt which I had against Kirk amounting to $2,800; he was not able to pay it. I have never asked him
423 for it, and never calculate to.

(Sol'r for compl't objects to all this evidence as irrelevant and not responsive to the direct examination.)

The estimates I have made were made on my experience of my own contracts and my own bids. I don't know whether the specifications of the Gordon contract were the same as at the time that I bid on them.

Direct examination resumed:

I had a conversation at Folsom with Kirk, is which he stated that Kohler, of San Francisco, had bought out Gordon's claims under the contract, and from that conversation he left the impression on my mind that he (Kirk) was in some way interested in it. He has told me frequently that he had no interest in it.

Witness wishes to explain with regard to the propositions made between Kinyon and himself with regard to the transfer by Kinyon to himself spoken of in the direct examination.

424 Witness stated: The South Fork Canal Company at that time I supposed was considerably indebted to me; also to my laborers, some 30 or 40,000 dollars—they held the certificates of indebtedness from the company.

I felt sensitive that they were seeking payment for their labor, and, it being impossible for the South Fork Canal Co. to redeem that scrip unless they could get the work in progress again and completed, they never could raise money to pay off these certificates. I found out afterwards that they were not indebted to me as much as I supposed, and compromised the matter with them.

JAS. S. LAW.

Subscribed and sworn to before me, this 24th day of Jan'y, A. D. 1860.

CUTLER McALLISTER, *Master in Equity.*

Indorsed: Filed Feb'y 1st, 1860.

CUTLER McALLISTER, *Clerk.*

425 *Deposition of Josiah L. Atkinson.*

Circuit court of the United States for the districts of California, in and for the northern district, in equity.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL CO. *et al.*

PLACERVILLE, *Jan'y*, 1860.

Be it remembered, that on this 20th day of Jan'y, A. D. 1860, personally appeared before me, Cutler McAllister, a commissioner appointed by the circuit court of the United States for the districts of California, under the laws of the United States, to take affidavits and acknowledgments of bail, &c. &c., Josiah L. Atkinson, to testify and the truth to say, on the part and behalf of the compl't, in a certain suit or matter of controversy now depending and undetermined in the abovenamed court, between the abovenamed parties; and the said witness, being of lawful age, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter or controversy aforesaid, did
426 thereupon depose, testify, and say as follows, viz:

Present: John Hume for compl't; S. W. Sanderson, for def'ts.

Questions by solicitors for compl't:

Ques. 1. Your name, age, and place of residence?

My name is Josiah L. Atkinson; am 35 years of age; reside in Georgetown, Eldorado county. Have seen both George Gordon and Alonzo Kinyon; can't say that I am personally acquainted with them. I was a director of the South Fork Canal Co., elected, I think, June 1853; don't recollect the precise date. I believe I was a director about the time that Gordon and Kinyon stopped working on their contract. It is so long since that I can't state definitely, but as far as I remember I can not state anything definite with regard to any instruction given by the board to Binney, their engineer, as to how
427 he should make his estimate.

I should judge that at that time the company were in embarrassed circumstances, for the evening I was elected I was called upon to know, as they wanted to raise $4,000, if I could assist the company. I procured a thousand dollars that day or the next day, which I lent to the company. I procured it with the assistance of Reynolds going security with me for the money, or rather he being responsible to me for the money.

I believe at that time the company made a strong effort to borrow money for different purposes, from different persons.

I believe they wanted the money so badly at that time to pay the estimate on the Gordon and Kinyon contract.

It is my impression that there was a letter read to the board from Gordon, demanding money upon an estimate that had been made.

The company, to my knowledge, had not the money to pay it at that

time. At that time the company met in a building on Main
428 street, Placerville.

I remember that one of the members of the board of directors told me that at a meeting previous a demand had been made in the name of George Gordon for the money due him on the estimate, and that upon the non-payment of the money he had notified them that he had rescinded the contract.

I was present when the release made by Kinyon was executed.

At the time of the execution of that release, two thousand dollars in money and three thousand dollars in stock, at the par value, was given to Kinyon in consideration of its execution. .

Don't remember just now of any other consideration being paid therefor.

Of my own knowledge, I do not know in whose name the stock was issued.

I have an impression that at the time the stock was issued Kinyon made a request that it should be put in his wife's name; I heard him state no reason for this request.

My impression is that the release was executed and the
429 money paid some time in daylight.

I did not see the money paid over to him myself, nor did I see the issuance of the stock, but think it was all done in daylight. Am almost positive it was.

Don't think that George Gordon was in the city at that time; he might have been; I have no knowledge on the matter, but I don't think he was.

I can't say positively whether there was or was not an understanding between Kinyon and the members of the board to keep the execution of that release secret until Kinyon could get out of the State. There was no action taken in the matter before the board.

I can't state the impression of other members of the board about it; my own impression was that Kinyon requested nothing to be said about it for a short time.

I can only state for myself, it was my impression he intended to leave the State.

I talked with one member of the board, Ralph Reynolds, with regard to the execution of this release; the substance of that
430 conversation, as near as I can recollect, was, I asked him if this release from Kinyon would be a good and valid release from Kinyon and Gordon to the company; and furthermore, whether he considered it an honorable transaction on the part of the company to enter into a thing of that kind. I do not recollect what reply he made to me, and my impression is that I told him that it was an unjust thing, even if it might be a legal thing. I can't remember anything else of the conversation.

When I said it was unjust, I considered it unjust to Gordon, as well as unjust to the stockholders, for the board of directors to take advantage of Gordon, and unjust to the stockholders for the trustees to make such a transaction.

Ques. Did you as a member of the board consider it a swindle upon Gordon ?

(Ques. objected to as improper.)

No, I did not. Still I did not look upon it as just right after
431 all. Had I considered it a swindle, I would not have voted for it.

Know nothing but by hearsay of the financial condition of Kinyon when he entered into this contract with Gordon.

(Def'ts' sol'r objects to the general reputation of Kinyon pecuniarily.)

As far as I can say, he was not considered to be a man of wealth. I heard Kinyon say himself, (Objected to,) the evening after this transaction was perfected, that what he had received from them was all the money he had. Am almost positive he made use of those words. My impression is that before the release Kinyon stated to some members of the board, myself among them, that he had, for his tending to the business, such a share of what was made out of the contract; and it is also my impression that one of the parties present, when I heard this remark of his, was Kirk.

432 Cross-examination:

Cannot say positively whether this conversation was before or after the execution of the release, but think it was before. It took place on the sidewalk near their office. Think there were one or two members of the board there. Can't recollect who they were. I don't state this positively, only state from my recollection.

Am not positive that this was before the release, but think it was, because I think it was one of the things that made me feel as I did about the execution of the release.

I think my election as a member of the board took place before the forfeiture of the Gordon contract by the board; this is my impression.

Could not begin to tell what day it was that the conversation took place with regard to the demand of Gordon for the estimate, &c.

I think this was very near the time that the execution of
433 the release took place.

I think Gordon made this demand before the board declared the contract forfeited.

JOSIAH L. ATKINSON.

Subscribed and sworn to before me this 20th day of Jan'y, A. D. 1860.

CUTLER McALLISTER, *Master in Equity.*

Indorsed: Filed 1st February, 1860.

CUTLER McALLISTER, *Clerk.*

434 *Deposition of T. J. Williams.*

Circuit court of the United States for the districts of California, in and for the northern district.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. *et al.*

PLACERVILLE, *Jan'y* 19, 1860.

Be it remembered, that on this 19 day of Jan'y, A. D. 1860, personally appeared before me, Cutler McAllister, a master in equity appointed by the circuit court of the United States for the districts of California, under the laws of the United States, to take affidavits and acknowledgments of bail, &c., &c, Thomas J. Williams, to testify and the truth to say, on the part and behalf of the compl't, in a certain suit or matter of controversy now depending and undetermined in the abovenamed court, between the abovenamed parties; and the said witnesses, being of lawful age, and having been by me first cau-
435 tioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, did thereupon depose, testify, and say as follows, viz:

Present: John Hume for compl't; S. W. Sanderson for def'ts.

Questions by compl't's sol'r:

Ques. 1. Your name, age, and place of residence?

Ans. Thomas J. Williams; am 27 years of age; I reside in upper Placerville.

Am not personally acquainted with either Gordon or Kinyon.

Am acquainted with the 8 miles at the upper end of the canal, which was their contract.

I worked on that ground for Mr. Kirk in 1854; part of the time as foreman and part of the time as carpenter.

I was one of the first men that went there after Kirk took
436 the contract.

The clearing and grubbing was done all the way through pretty much; occasionally we would have to grub and clear a little; once in a while we had to, but very seldom.

The most of the grading was done the whole way through; once in a while there was a place where Mr. Gordon calculated to put up trestles, that Mr. Kirk graded.

To the best of my knowledge, there was timber enough got out to put up the trestle on the whole line.

In trestling they use ten inch square, of different lengths, and then there were some used for braces in the trestles 5 x 6 or 5 x 7.

There was sills enough got out for the flume clear through; these sills were 3 x 4; a portion of these sills were framed, part of them were not.

These sills were sawed timber.

There were some posts got out for the flumes, and some caps; don't know how many—a small portion.

437 Don't think there was enough of the posts or caps for one-quarter of the work.

The posts and caps were sawed timber 3 x 4.

I remained working under Kirk until he completed his contract.

Estimating everything that had been done, I should say that the work had been half completed when Kirk took it.

The current price of common laborers in the spring and summer of 1853, when I was working at Negro Hill, three miles from Placerville, was from 60 to 100 dollars per month, board included.

Up where I was working at that time it was some trouble for them to get laborers.

Cross-examination:

I commenced working for Kirk on the South Fork canal in March, 1854; there were no hands at work there at that time.

Six or seven of us went there at that time.

438 I was in the gang that went with Mr. Heuitz.

Mr. Kirk completed his contract, I think, in August, 1854; I cannot say positive, I am under the impression it was in August.

I don't think it was in September that he finished his contract, but can't say positive.

I don't know who did the work that Kirk finished; I have heard say who it was.

All I know about the price of labor concerning which I have testified was what Mr. Kirk paid his laborers at Negro Hill.

Don't think Mr. Kirk cleared and grubbed a sixth of this 8 miles.

I could not say as to the amount he graded.

Think he hardly graded a mile.

To the best of my recollection think he graded from $\frac{1}{2}$ to $\frac{3}{4}$ of a mile.

He did a good deal of blasting on rocks that were in the way, and in making bearings.

439 I think Gordon had made a mile of bearings.

Could not say how much trestle-work there was up.

Mr. Gordon had made bearings to put trestle-work on in places where Mr. Kirk changed the grade.

T. J. WILLIAMS.

Subscribed and sworn to before me this 19th Jan'y, A. D. 1860.

CUTLER McALLISTER, *Master in Equity.*

Indorsed: Filed Feb'y 1st, 1860.

CUTLER McALLISTER, *Clerk.*

440 *Deposition A. Hunter.*

Circuit court of the United States for the districts of California, in and for the northern district.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. *et al.*

PLACERVILLE, *Jan'y* 21, 1860.

Be it remembered, that on this 21st day of Jan'y, 1860, personally

appeared before me, Cutler McAllister. a commissioner appointed by the circuit court of the United States for the districts of California, under the laws of the United States, to take affidavits and acknowledgments of bail, &c., &c., Alexander Hunter, to testify and the truth to say, on the part and behalf of the compl't, in a certain suit or matter of controversy now depending and undetermined in the abovenamed court, between the abovenamed parties; and the said witnesses, being of lawful age, and having been by me first
441 cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, did thereupon depose, testify, and say as follows, viz:

Present: John Hume for compl't; S. W. Sanderson for def'ts.

Questions by sol'r for compl't:

Ques. 1. Your name, age, and place of residence?

Alexander Hunter; am 33 years of age; I reside in Placerville.

In 1853, the spring and summer of that year, I was engaged in the express and banking business.

The current rate of interest at that time varied.

(Sol'r objects to testimony on the ground that when no rate of interest is specified the law fixes the rate.)

442 It varied from three to four per cent. per month.

I have received five per cent. for money at that time.

Cross-examination:

The ordinary rate of interest at that time was 3 and 4 per cent., varying according to the character of the securities.

ALEX. HUNTER.

Subscribed and sworn to before me this 21st Jan'y, A. D. 1860.

CUTLER McALLISTER, *Master in Equity.*

Indorsed: Filed February 1st, 1860.

CUTLER McALLISTER, *Clerk.*

443 *Deposition of Joseph M. Douglass.*

Circuit court of the United States for the districts of California, in and for the northern district.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. *et al.*

PLACERVILLE, *Jan.* 21, 1860.

Be it remembered, that on this 21st day of Jan'y, A. D. 1860, personally appeared before me, Cutler McAllister, a commissioner appointed by the circuit court of the United States for the districts of California, under the laws of the United States, to take affidavits and acknowledgments of bail, &c., &c., Joseph M. Douglass, to testify and the truth to say, on the part and behalf of the compl't, in a certain suit or matter of controversy now depending and undetermined

in the abovenamed court, between the abovenamed par-
444 ties; and the said witness, being of lawful age, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, did thereupon depose, testify, and say as follows, viz:

Present: John Hume for compl't; S. W. Sanderson for def'ts.

Questions by compl't's sol'r:

Ques. 1. Your name, age, and place of residence?

Joseph M. Douglass; am 40 years of age; I reside in Placerville.

In the spring of 1853 I was loaning money at the city of Placerville, from 3 to 5 per cent. per month.

Can't say what other people loaned money at.

Was engaged in loaning money at that time.

445 (Def't sol'r objects to this evidence as incompetent.)

My presumption is that men would not borrow money from me if they could get it any cheaper.

Perhaps the usual rate of interest was from 3 to 4 per cent.

(Same objection as to evidence of Hunter.)

J. M. DOUGLASS.

Subscribed and sworn to before me this 21st day of Jan'y, A. D. 1860.

CUTLER McALLISTER, *Master in Equity.*

Indorsed: Filed Feb'y 1st, 1860.

CUTLER McALLISTER, *Clerk.*

446 *Deposition of F. Baker.*

Circuit court of the United States for the districts of California, in and for the northern district.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO.

PLACERVILLE, *Jan.* 20, 1860.

Be it remembered, that on this 20th day of Jan'y, A. D. 1860, peronally appeared before me, Cutler McAllister, a master in equity appointed by the circuit court of the United States for the districts of California, under the laws of the United States, to take affidavits and acknowledgments of bail, &c., &c., Frederick Baker, to testify and the truth to say, on the part and behalf of the compl't, in a certain suit or matter of controversy now depending and undetermined in the abovenamed court, between the abovenamed par-
447 ties; and the said witness, being of lawful age, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, did thereupon depose, testify, and say as follows, viz:

Present: John Hume for compl't; S. W. Sanderson for def'ts.

Questions by sol'r for compl't:

Ques. 1. Your name, age, and place of residence?

Frederick Baker; am 36 years of age; I reside in Placerville.

I was acquainted with George Gordon and Alonzo Kinyon.

Am acquainted with the ground covered by their contract with the South Fork Canal Co.

I was in the employ of the South Fork Canal Co., as assistant engineer on that contract, in 1853.

The length of the line under contract to Gordon and Kin-
448 yon was less than 9 miles.

Gordon and Kinyon commenced operations on that line in March, I think; that was the time they went up there; they commenced building saw-mills, I believe; can't say the exact time at which they commenced operations on the line itself.

Have forgotten with how many men they commenced work.

They commenced with one cap up, The first work done by them on the line was grubbing and clearing.

I think they grubbed and cleared all the line under contract to them; if not all, very nearly all—I think all.

The next work done by them was grading and excavating the rock, preparing it for the flume.

They commenced grubbing and clearing at first, and after that the grading and grubbing and clearing went on together.

449 I can't state positively how much of the whole line they graded; I should think, however, two-thirds of it.

I was on the line acting as assistant engineer all the time they were at work.

I know that there was a good deal of complaint made by Gordon that his men could not go on with their work for the want of grade pegs.

Can't state the precise date. The engineers went up there in February, and commenced at the lower part of the line and worked up.

Gordon complained that they were waiting above for grade pegs; that he could not go on with their work, and blamed the engineer for not having them ready. This was after he came up. Can't recollect the precise time.

He made complaint sometimes to me, *sometimes to me*, sometimes to Turner, sometimes to Binney, who was up there occasionally.

450 Binney was chief engineer. Turner had charge of the level, and I was with him.

When Gordon made the demands for grade pegs, we told him we would get up where his men were as soon as we could.

Don't remember how long after the demand was made by Gordon it was that we got up to where the men were working.

We commenced at the lower end and Gordon commenced in the middle of the line.

Gordon asked us frequently to put grade pegs in different places, that he wanted to put gangs of men to work at different places, and

had no grade pegs. I think we finished setting the grade pegs about the first of June.

It was worth more than what Gordon was to get for it to clear and grub that line.

My recollection is, that he was to get 300 dollars per mile for it.

451 Can't say positively how much it was worth to grade the line.

According to my estimate, to grade and excavate the entire line would be worth $20,000.

This is but a rough estimate; I mean to prepare it for the flume; this includes cutting bearings, rock, and all.

I went over the line in June, 1853, with the chief engineer, while he was making the estimate, and sometimes I help him.

He only estimated the grubbing and the grading that was done, the lumber that lay along the grade, and some trestle-work that had been put up.

He estimated probably one-half of the work that had been done; can't say exactly; I believe what he estimated amounted to $16,000.

In my opinion, forming a rough estimate, I should say that at the time they stopped, including the cost of getting started and

452 everything, Gordon and Kinyon had done between ⅓ and ½ of their whole contract.

I think Gordon and Kinyon prosecuted the work as vigorously as they could.

I only know of one reason that Gordon and Kinyon could not get hands, the bad repute of the company; the contractors were liable to the men, and it was their fault if the men were not paid.

Can't state positively, but think that at times Gordon and Kinyon had about 200 men at work *at times*, perhaps more.

I think the current rate of wages for laboring hands at that time was between 60 and 70 dollars, including board; can't state positively.

Can't say positively about the reason Mr. Binney gave for estimating only the timber that was along the grade.

Did not hear any member of the South Fork Canal Company say anything about it.

453 When Gordon demanded grade pegs, the engineer of the company did not go to the points where he wanted them and fix the grade for him; he had to wait until they got there.

The engineering party commenced at the lower end and travelled up, continuously fixing the grade to the upper end.

We set the grade pegs on an average ¼ of a mile a day; it might be more; it is so long ago that I have forgotten.

We worked from the time we started continuously setting grade pegs, and don't think we got through setting them until the first of June.

When we went over it the first time we only set one line of grade pegs.

After the work is graded there has to be another line set.

Cross-examination:

454 Don't think that while Gordon and Kinyon *yon* were at work, there were enough grade pegs set to employ their men advantageously; but there were enough set to have occupied all their men.

I was there subsequently when Kirk completed the contract; don't think he did any grubbing and clearing; think Gordon did the whole of it; perhaps Kirk did a little; he took up the work when Gordon left off.

He finished it; don't know how much grading he did; perhaps he might have done a third of it.

Gordon did not cut a great many bearings for the trestle-work; probably he cut about half of a mile of them.

Think the engineering party commenced in February.

We commenced to set the grade pegs before it was grubbed and cleared; that was what took us so long; it was very bad ground
455 to get over; very busy, &c.; Gordon had not got up there when we commenced.

We were at work continually after we commenced, setting grade pegs.

We were from the last of Feb'y to the 2st May setting eight miles of grade pegs.

Think there was an estimate made by Mr. Binney prior to the June estimate that I have testified about; can't say positive.

Can't state the average number of men that Gordon and Kinyon had at work; don't know how many he had when we first commenced; I expect the average number of men would be about 150; perhaps a good deal more.

Don't remember how many times Gordon sent for grade pegs; he wanted them above, and we told him we could not skip over, but would be there as soon as possible.

456 There were plenty of grade pegs set below.

Cross-examination resumed:

The timber that was not estimated by Mr. Binney was known to him, but was not in sight, except a small portion by the slides.

Had Gordon and Kinyon set their men to work at the grade pegs below, they could have worked all their men; but not to advantage—it would take them all day to get from their camps and back again.

I believe there was men at work at the line below where we had set grade pegs; some clearing and grubbing, and some grading; how many gangs I don't know.

It is necessary to commence the work at various points with small gangs of men to push it rapidly forward; it was very difficult
457 getting over the line.

His saw-mills were situated a little above the middle of the line, and just below that, on the grade, he made his headquarters.

He had to get his timber on the ridge along the line, and put down by slides wherever they could get it down; there were probably a dozen places along the whole line where they could get their tim-

ber and lumber down; don't know that there was that many; the lowest point at which they got the lumber and small timber down was at a railroad a little above the middle of the line; there was no other convenient place to get the lumber down without a great deal of expense, except at the points where they did get it down.

458 Before they could move the timber and lumber from the place where it was brought down, they would have to have had the line graded along which to take it; in moving the timber after the line was graded, it would not make any difference whether they moved it up or down.

FREDERICK BAKER.

Subscribed and sworn to before me this 20th Jan'y, A. D. 1860.

CUTLER McALLISTER, *Master in Equity.*

Indorsed: Filed Feb'y 1, 1860.

CUTLER McALLISTER, *Clerk.*

459 *Deposition of J. C. Johnson.*

Circuit court of the United States for the districts of Californinia, and for the northern district.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. *et al.*

PLACERVILLE, *January* 21, 1860.

Be it remembered that on this 21 day of Jan'y, A. D. 1860, personally appeared before me, Cutler McAllister, a commissioner appointed by the circuit court of the United States for the districts of California, under the laws of the United States, to take affidavits and acknowledgments of bail &c., John C. Johnson, to testify and the truth to say, on the part and behalf of the compl'ts, in a certain suit or matter of controversy now depending and undetermined in

460 the abovenamed court, between the abovenamed parties; and the said witness, being of lawful age, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, did thereupon depose, testify, and say as follows, viz:

Present: John Hume for compl't; J. W. Sanderson for def'ts.

Questions by sol'r for compl't:

Q. 1. Your name, age, and place of residence?

John C. Johnson; am 37 years of age; I reside at Johnson ranch, Eldorado county, Placerville township, California.

Am acquainted with George Gordon and Alonzo Kinyon, formerly contractors in the South Fork Canal Company.

461 Am acquainted with some of the board of directors of the South Fork Canal Co.

I have had a conversation with some of the members, which conversation took place about the time of the suspension of the work,

when a difficulty took place between Gordon and Kinyon and the board of directors in regard to payments under said contract.

The conversation was to the effect that Gordon would be compelled to give up the contract from the fact of his being unable to finish the contract in time, and that they would sue him on his bond and finish the work themselves.

This was during a day or two of difficulty that Gordon had with the board when he had come in to get his money.

It was just about the time of his suspension, the company claiming that he had not complied with his contract, and refusing to
462 pay the estimate which Gordon at that time claimed, he claiming that the company had not complied with the conditions of the contract.

Nothing was said to me by any of the directors of the board at that time in regard to the interest of Kinyon in the contract with Gordon and Kinyon.

Have heard remarks made by members of the board with regard to Kinyon's interest in the contract; they were made, I think, subsequently to Kinyon's release.

(Def'ts' solicitor objects to any evidence with regard to any remarks made subsequent to the release.)

Remarks to this effect, that Kinyon was a man without means, that he had got nothing to lose, and that Gordon was the moneyed and responsible man.

At the time Kinyon entered into the contract with Gordon
463 he did not appear to be possessed of any means.

(Def'ts' sol. objects to any evidence of the pecuniary condition of Kinyon, unless a knowledge of said condition is brought home to the board of directors of the company prior to the execution of the release.)

About that time Kinyon told me that he thought he had got a very good contract, but was doubtful of his ability to furnish the bond required by the board. Subsequently he went to San Francisco, and on his return he said he had got his bond.

(Def'ts' sol'r objects to any evidence with regard to the statements of Kinyon, unless said statements were repeated by the witness to a member or members of the board of directors of the co., and
464 unless they were so communicated before the execution of the release.)

Kinyon stated to me that he was poor, and that about all that he owned was a public house on the Sacramento road, a few head of stock—a mule or two.

Don't think that Kinyon was well known here generally, but I think that he was known to the members of the board of the South Fork Canal Co., with whom he had been doing business.

(Objected to as the opinion of the witness.)

Kinyon was known to me personally, because he boarded at my house for some time.

A day or two prior, or a short time prior, to the execution of the

release, have heard members of the board say what Kinyon's interest in the contract was.

465 I remember that Mr. W. Buchanan and T. A. Springer told me that Gordon and Kinyon had signed a contract which they could not complete in the time required; that the work would have to be abandoned and given up, and the company would go on and complete it themselves.

I looked upon this as empty declamations, and as characteristic of the man Buchanan; he was rather given to blowing. I thought he was gassing, as I was well satisfied in my own mind that the company did not have the means; they seemed to be tight up for money about that time. About that time of the difficulty, a few days prior, Buchanan told me that Kinyon had not got any money to lose, and that his interest arose from his personal labor on the contract; that Gordon was the moneyed man.

466 At the request of Gordon I went along the upper portion of the line; in fact, I am not certain but that I went all the way through; at any rate I went over nearly the whole of the line in the contract. This was about the time of the difficulties between Kinyon and the company.

Mr. Gordon requested me to go over the line and see if the grade pegs were set.

This was somewhere between two months and ten days before the work was suspended.

This was during some disputes between the contractors and the company which arose out of claims that Gordon said he had for estimates, which he claimed, and which the company refused to pay.

Some other gentleman was requested to go, and who also accompanied me, but I have forgotten who he was.

467 The lower portion of the line was in condition to work upon, so far as grade pegs were concerned; can't say how much of it, but the major part of it was not in a condition to grade; that is, had no grade pegs set. At that time Gordon had a force of men on the work.

The majority of them were off some distance from the line getting out timber, &c. A portion of the men were at work on the lower end of the line, and a portion on the upper.

Am not certain that any of the men were engaged in grading at all.

I located Gordon's camp for him at his request. I selected the spots for him.

He had two that I know of, but I rather think he had three. I selected two for him at Oak Hill and at the upper slide where the sawmills were.

These places were the best localities that I could find for
468 him to work advantageously.

There were no pegs set at or near the upper camps; at any rate I could not find them.

There were pegs set at the lower end of the line, conveniently near to the Oak Hill camp.

I am satisfied there was grading done and grade pegs set at the lower end of the line, but for what distance I cannot say.

Cross-examination—ques's by def'ts' sol'r:

The first conversation with Mr. Buchanan took place at my ranch.

This conversation took place about the June estimate. I should judge it was near that time.

The remark of Buchanan was drawn out by some sympathetic remark on the some of the bystanders, expressing sympathy for Kinyon; that he was working hard; that the men were clamorous for
469 their wages, and that the work was about stopping. Mr. Buchanan then said Kinyon had nothing to lose, &c.

The two conversations I have testified to with Buchanan took place a few days from each other, about the same time.

Completed the survey which I made at the request of Gordon in one day.

I did not go to the upper end of the line by two miles.

Passed by the camps on a line with the grade; could not see them all from the grade. Passed on the grade above all of them.

Can't say how far from the lower end of the line the Oak Hill camp was. It was the most convenient point to camp, in my judgment, to the lower end of the line, which, I should think, would be the place at which to commence grading.

I would not state the distsnce for which the grade pegs
470 were set; they might have been set for a half a mile or a mile.

Going up I stopped at the Oak Hill camp and took a snack, and think there were about 35 or 40 men there; the most of the men were at the upper camps on the hill.

The Oak Hill camp was established, I should think, for graders and grubbers.

At that time everything was coming to a halt. Mr. Gordon had had some difficulty before that with the company about estimates, and had requested me to go up and make this survey.

The other camps were engaged in lumbering and timbering, and were near the saw-mills, and for that purpose their camps were located near the mills, which were located at the most accessible points for getting down lumber easily to the ditch.

I don't know anything personally about the estimates except
471 what I heard from Mr. Gordon. But I am satisfied from what I heard from him and the directors that there was a dispute about it.

When I was up there I think there were grade pegs enough set to occupy the men at the Oak Hill camp a few days.

When Gordon and Kinyon took it I was satisfied in my own mind that they could not finish it in the time required by the contract; this was also my opinion at the time I was making the survey.

(Objected to as not being cross-examination, and because no foundation has been laid to entitle the witness to give his opinion as an expert.)

At that time I was familiar with the country over which the line of

the canal was run, and was acquainted with the difficulties and labor connected with the work.

Am familiar with the getting out of lumber; have been engaged in it somewhat.

472 At that time I can't say that I knew what Mr. Gordon thought of his own ability to complete his contract. But I thought he had the impression himself that he could not do it in the specified time. I was under the impression that it was a grand race on the part of the directors to make him forfeit his contract, and a grand struggle on his part to make them guilty of laches on their part.

(Opinions of the witness objected to as not being cross-examination, and because the opinions of the witness are not evidence, but the facts on which such opinions are founded.)

Direct examination resumed:

473 At the time I went over the line, I went in sight of one of the upper camps. I think he had three camps; don't know whether he had any other camp but the Oak Hill camp for graders and grubbers or not. He might have had three or four.

Cannot say definitely whether there were grade pegs set to occupy the gang at the Oak Hill camp advantageously or not. There was grading to be done there; that is, grade pegs set.

I was associated with a company once in clearing a track, making an embankment, &c., for a railroad; am not a practical engineer; never followed contracting business.

Am the Johnson after whom the Johnson pass is named.

J. C. JOHNSON.

Subscribed and sworn to before me this 21 Jan'y, A. D. 1860.
CUTLER McALLISTER, *Master in Equity.*

Indorsed: Filed Feb'y 1st, 1860,
CUTLER McALLISTER, *Clerk.*

474 *Deposition J. Hand.*

Circuit court of the United States for the districts of California in and for the northern district.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL CO. *et al.*

PLACERVILLE, *May* 9, 1860.

Be it remembered, that on this 9th day of May, A. D. 1860, personally appeared before me, Cutler McAllister, a commissioner appointed by the circuit court of the United States to take affidavits and acknowledgments of bail, &c., &c., Joseph Hand, to testify and the truth to say, on the part and behalf of the compl't, in a certain suit or matter of controversy now depending and undetermined in the abovenamed court, between the abovenamed parties; and the

said witness, being of lawful age, and having been by me first
475 cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, did thereupon depose, testify, and say as follows, viz:

Present: John Hume for compl't; Thos. H. Williams for def'ts.

Questions by att'y for compl't:

Ques. 1. Your name, age, and place of residence?

Joseph Hand; I am 27 years of age; I reside in Eldorado county. I am not acquainted with George Gordon.

I went, in 1854, to work on the South Fork canal under John Kirk & Co.; I think it was somewhere about the 20th March we got there to commence work—won't be positive—within a day or two. Kirk had done no work there before I got up.

I worked on the canal after I got there. I worked from the
476 upper end, nine miles down, putting the trestle-work on.

When I went there to work under Kirk & Co. there were materials on the ground that we used.

Work was done upon various portions of the line of the canal, such as grubbing, grading, &c.

On the 9 and ¾ mile supon which I worked the grading had all been done; there was a little blasting to be done at various points, clearing it off, but the majority had all been done. I don't think there was any grubbing to be done for that distance; there might have been on two miles of it at various points, but I don't think there was any to be done. In this distance there were probably a dozen tents put up at the point where the timber slide reached the line of the canal.

This was the only piece of trestle-work that had been put up
477 when I got there.

Ques. 1. State what was your means of knowledge as to the amount of timber, lumber, or other material lying along the line of the canal, near the slides, or on the hills adjacent, which had been prepared for the work at the time you went there and was placed in the work by John Kirk.

(Sol'r for def't objects to the question as immaterial and irrelevant, so far as affecting the question of lien and the rights of persons parties to this suit other than the corporation of the South Fork Canal Co.)

Answer 2. I was one of the hands that framed and helped to put up the trestle-work, and the other timber and lumber was floated right by where I was working.

I never made any estimate of the amount of timber and lumber used in those 9¾ miles of the canal. I think there was enough
478 ten-inch timber got out and on the line of the canal, and below it, to have finished the work at the time Kirk went there. I mean above and below the line of the canal. The most of the timber was hauled to the slide; there was a little of it to haul. Kirk got out some ten-inch timber to use, and there was as much timber below and above the line of the canal as he got out; Kirk never used but little of the timber that he got out.

In the trestle-work we used 5 x 7 inch timber for braces; of the brace timber for the 9¾ miles, Kirk sawed a little of it; can't say how much; the majority of it, I think, was got out at the time we got there.

Of the boards for the 9¾ miles, I think there was half of it gotten out when we got there.

In addition to the 10-inch timber brace and boards, there were caps, sills, and posts used in the construction of the ditch.

479 For this 9 and ¾ miles the majority of the caps, sills, and posts was gotten out at the time we got there, according to the best of my recollection.

Of the boards there was a large quantity on the grade when we got there.

One-half of the sills, caps, and posts were at the slide on the grade when we got there.

(Sol'r for def'ts objects to all the foregoing testimony succeeding the question to question 1, on the grounds embraced in the objection to said question.)

Ques. 2. Were there any roads constructed through the woods for the purpose of hauling lumber or timber to the line of the canal?

(Same objection as before.)

Ans. 2. There were roads made to all the slides. I don't know whether Mr. Kirk had to make any new roads or not. I

480 worked for Mr. Kirk during the summer of 1854, till the work was completed.

The timber and lumber we found there was used by Mr. Kirk in the construction of the canal.

Evidence objected to as before.)

Cross-examination

I went from Sacramento with Mr. Kirk; prior to that time I had known him about 9 mo's; had been in his employ about three months; worked under him on the water works in Sacramento. From the time I worked for him down to this time I have been on intimate terms with Mr. Kirk. Mr. Kirk did not request me to come here and testify. I was working on the ditch and Mr. Bishop, the present superintendent of the work, told me to come down, there was some business on hand; this was, I think, last Thursday. I came

481 down Sunday evening, have been here since.

During my stay in town have had no conversarion with Mr. Kirk in regard to my testifying—none at all. Don't know Mr. Kohler.

Have not talked with any one about the matter since I came down. Never heard anybody talk about the matters in controversy in the cause before the taking of the first testimony in this case.

At the time I went to the canal in 1854, I should judge it was completed to Long Cañon and receiving water from Long Cañon.

It was receiving water from Iowa Cañon, Brush Cañon, and North Cañon.

The work Mr. Kirk did was confined to building the canal from Long Cañon to the south fork of the American river.

Could not say what amount of that distance grading was re-

482 quired, but think that more than half of it was grading.

Grading is digging down the earth to a level wide enough for the flume.

Quest. 1. Was not the most of this grading very light grading?

(Ques. objected to on the ground that the value of the grading is fixed by the contract.)

None of it was very heavy grading, the heaviest was from 4 to 6 feet; don't think any of it was over 6 feet.

Don't know of a point on the line where the grading is 6 feet, but think I can show points where the grading is five feet.

Ques. 2. Upon what portion of this line was there, or had there been, any brush, and how much?

(Ques. objected on the ground that the contract fixes the price of grubbing and clearing.)

Ans. 2. I could not say without measuring.

483 When I first went there I went over 5 and ¾ miles of this line. I did not examine it carefully to find out what amount of work had been done on it. I saw timber at the slides, &c. My business was to assist in putting up trestle-work. I paid no particular attention to what was going on except in my own particular department.

Don't know whether Kirk had to cut any brush on the line or not; can't say; if there was any cut by Kirk, it was but mighty little; can't say how much timber or lumber was right on the grade on the line of the canal; think there was more than one-third of it above the grade, so as to take hold of it put it right on the grade.

There was some on the grade on line of the canal.

Kirk did not use all the lumber and timber below the grade in constructing the canal.

There was some of it so far below the grade as to make it

484 less expensive to get out new timber and haul it to the slides than to get it up.

(Sol'r for compl't further objects to the evidence on cross-examination with regard to grading and grubbing that it was not responsive to the examination in chief.)

Of the timber actually on the line of the canal there was very little. I mean by timber being on the grade, such timber as is placed convenient for working without having to haul it or slide it down.

Direct examination resumed:

Can't say whether there was any other person interested in putting up that 9¾ miles in 1854 than Kirk. I did not know anybody else in it.

JOSEPH HAND.

Subscribed and sworn to before me this 9th day of May, A. D. 1860.

CUTLER McALLISTER, *Master in Equity.*

Indorsed: Filed May 30th, 1860.

CUTLER McALLISTER, *Clerk.*

Circuit court of the United States for the districts of California, in and for the northern district.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL CO. *et al.*

PLACERVILLE, *May 9th*, 1860.

Be it remembered, that on this 9th day of May, A. D. 1860, personally appeared before me, Cutler McAllister, a commissioner appointed by the circuit court of the United States for the districts of California, under the laws of the United States, to take affidavits and acknowledgments of bail, &c., &c., Charles Binney, to testify and the truth to say, on the part and behalf of the compl't, in a certain suit or matter of controversy now depending and undetermined in the abovenamed court, between the abovenamed parties; and the said witness, being of lawful age, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, did thereupon
486 depose, testify, and say, as follows, viz:

Present: John Hume for compl't; Thos. H. Williams for def'ts.

Questions by sol'r for compl't:

Ques. 1. Your name, age, and place of residence?

Charles Binney; am near 50 years of age; I reside in Eldorado county.

Ques. 1. State whether you ever had any conversation with Alonzo Kinyon, Gordon's co-contractor, in regard to his (Kinyon's) making a release to the South Fork Canal Company of his and Gordon's interest in the contract for building the South Fork canal.

(Objected to as calling for hearsay testimony and a statement of the party in interest with the compl't.)

Ans. 1. Have had such conversation with him, but it has been so long I can scarcely recollect.

As nearly as I recollect, it occurred just previous to his
487 leaving the State, only a day or so; he told me he was going to leave; everything was kept secret, though, at that time.

As near as I can recollect he told me he was going to leave; not to say anything about it; that he was going to get away without Mr. Gordon knowing anything about it.

He said that Gordon wanted to cheat him, and he determined to take advantage of him (Gordon) in that way; that he had, or would turn the tables upon him.

I think he said that the directors of the South Fork Canal Co. had consented to advance him money, and he would give them a release.

Don't recollect of anything further he said to me.

(The whole of above evidence objected to for the same reasons as ques. 1st.)

Cross-examination:

I mean by "everything was kept secret" the fact that Kinyon kept secret his intended departure from the State. The canal,
488 up to Long Cañon, was constructed for the South Fork Canal Co. by various contractors, who constructed various sections; it was completed up to that point, and the water running through it, the July or August previous to the time that the contract for the construction of the balance of the canal was given to Gordon and Kinyon.

CHARLES BINNEY.

Subscribed and sworn to before me this 9th day of May, A. D. 1860.

CUTLER McALLISTER, *Master in Equity.*

Indorsed: Filed May 30th, 1860.

CUTLER McALLISTER, *Clerk.*

489 *Deposition C. C. Batterman.*

Circuit court of the United States for the districts of California, in and for the northern district.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. *et al.*

PLACERVILLE, *May 10th*, 1860.

Be it remembered, that on this 10 day of May, A. D. 1860, personally appeared before me, Cutler McAllister, a commissioner appointed by the circuit court for the United States for the districts of California, under the laws of the United States, to take affidavits and acknowledgments of bail, &c., &c., C. C. Batterman, to testify and the truth to say, on the part and behalf of the compl't, in a certain suit or matter of controversy now depending and undetermined in the abovenamed court, between the abovenamed parties; and the said witness, being of lawful age, and having been by me first cau-
490 tioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, did thereupon depose, testify, and say as follows, viz:

Present: John Hume for compl't; Thos. H. Williams for def'ts.

Questions by sol'r for compl't:

Ques. 1. Your name, age, and place of residence?

Christopher C. Batterman; am 31 years of age; I reside in Placerville. I was acquainted with George Gordon. At the time the contract was let to Gordon and Kinyon I was book-keeper of the canal co. I became the secretary of the co. in May or June, 1853, and held that office at the time Gordon and Kinyon abandoned the contract. My position in the company required me to be in attendance on their meetings, which were held in the office of the company.

At the time the work was let to Gordon and Kinyon the co.
491 required of them a bond.

I am not certain, but think they required him, Gordon, to furnish sureties.

I don't recollect whether or not Kinyon made any statement of his property.

Ques. State whether Mr. Kinyon was well known to the members of the board at the time the contract was let to Gordon and Kinyon?

(Objected to as calling for testimony which is irrelevant and immaterial.)

I should think so, as he had formerly worked for the co.

(Objected to as before.)

After the contract was let to Gordon and Kinyon, I think they demanded grades and levels from the company.

Ques. Do you know what was the ordinary rate of wages for ordinary laborers, with board, at the time Gordon and Kinyon were working on their contract?

(Objected to as immaterial.)

I should think somewhere from 50 to 70 dollars.

492 The engineer made the estimate, and the money was tendered within a day or two after. This tender was made to Kinyon, sometime in the evening about 10 o'clock.

Don't know whether Kinyon was in bed at the time the tender was made; he was in his room.

Think I was present at the time Kinyon executed the release to the board.

I think the negotiations with regard to it were commenced one day, and the release was executed the following morning.

At the time we transacted that business the company sat with closed doors.

I think $5,000 was paid Kinyon at the execution of the release, part in money and part in stock.

I think $3,000 cash, and $2,000 in stock; or else $2,000 cash, and $3,000 in stock; will not be positive.

493 The stock was issued in the name of some woman, I think his wife; I think the money was paid and the stock issued in the morning.

I suppose at the time of this transaction George Gordon was at San Francisco, don't know.

I think Kinyon stayed in Placerville after the money was paid and stock issued, about a day.

I left the books of the company in the office when I left their employ in Sept., the books in the possession of the receiver, Jo. Gordon.

There was the usual set of books, cash-book, journal, ledger, and stock-book, and minute book. Nobody succeeded me as sec'y of the co.

Cross-examination:

I think the board required some sureties on Gordon's bond, and he filed a statement of his property in place of the sureties, which they considered satisfactory.

494 In speaking of Gordon and Kinyon demanding grades, I mean that they wrote a letter to the company requesting grades and levels.

(Testimony with regard to the demand for grades and levels objected to by sol'r for def't, as proving by parol the contents of a writing.)

Don't know that the company made any particular reply to the letter.

I should think that $50 was the average wages for common laborers at the time of the contract.

The board frequently sat with closed doors, especially when they had business of importance.

I presume the sec'y issued the stock to Kinyon.

The board directed the stock to be issued in accordance with the settlement—by Kinyon's orders it was issued in the name of a woman supposed to be his wife.

The certificates of stock were signed by the president and secretary.

Sometimes the president signed them in blank, and they were
495 filled out afterwards.

When persons came to procure stock, we were in the habit of issuing it in such names as they directed.

Stock was in some cases issued in the name of the wife of the man procuring it.

(Objected to as immaterial.)

The tender which was made to Kinyon was gold and silver coin.

Direct examination resumed:

Can't say whether the certificates of stock issued to Kinyon's wife were filled up before or after the president had signed them.

The indebtedness of the company at the time of the contract to Gordon & Kinyon may have been from 50 to $100,000.

(Objected to as immaterial.)

496 Jo. Gordon, the receiver I have spoken , was not an officer of the co.

Don't know what became of Gordon's letters to the company. They were in my custody as sec'y of the co., and I left them in the office of the company. I did not leave them in possession of an officer of the company—left everything with Jo. Gordon, the receiver.

C. C. BATTERMAN.

Subscribed and sworn to before me this 10th day of May, A. D. 1860.

CUTLER McALLISTER, *Master in Equity.*

Indorsed: Filed May 30th, 1860.

CUTLER McALLISTER, *Clerk.*

Circuit court of the United States for the districts of California, in and for the northern district.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. *et al.*

PLACERVILLE, *May* 10, 1860.

Be it remembered, that on this 10th day of May, A. D. 1860. personally appeared before me, Cutler McAllister, a commissioner appointed by the circuit court of the United States for the districts of California, under the laws of the United States, to take affidavits and acknowledgments of bail, &c., &c., Joseph W. Taylor, to testify and the truth to say, on the part and behalf of the compl't, in a certain suit or matter of controversy now depending and undetermined in the abovenamed court, between the abovenamed parties; and the said witness, being of lawful age, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, did thereupon depose, testify, and say as follows, viz:

498 Present: John Hume for compl't; Thos. H. Williams for def't.

Questions by sol'r for compl't:

Ques. 1. Your name, age, and place of residence?

Joseph W. Taylor; I am 45 years of age; I reside in Sacramento city.

I worked on the South Fork canal in 1854, under Mr. Kirk.

I worked on the upper portion, from Long Cañon into the river.

I handled nearly all the timber that went down the slides, caps, sills, posts, &c.

I had charge of that portion of the work.

Examination adjourned until to-morrow, at 9 o'clock a. m.

PLACERVILLE, *May* 11*th*, 1860.

Examination of Joseph W. Taylor, this day continued,

Present: John Hume for compl't; Thos. H. Williams for def'ts.

499 I have been over the line of that portion. At the time I went there the grubbing had all been done.

The grading was pretty much all done; there was a few alterations made afterwards at certain points; I mean it was pretty much all done below the railroad slide.

Above the slide the grade was run up to Saw-Mill Cañon; from that place to the American river the engineer of the co. intended to put trestle-work.

We called the distance from the railroad slide to the river 3 miles. There was some grading down on that part of the line by Mr. Kirk; there was some of the rock blown off by him in order to get a bearing for the flume to rest upon.

The line was changed from the Gordon contract by the engineer.

I think the grading done by Kirk was necessary on account of the change in the line.

For the trestle there was timber ten inch square; sills 4
500 x 6; I think posts and caps, 3 x 4; plank, 3½-inch plank.

Of the ten-inch timber for the whole work there was enough out when I got . I did not see any new 10-inch timber; there was an overplus of this timber which was got down the slides to be used in repairs.

All of the brace timber that we used was out when I got there. Pretty much all the sills were out also; there was some new ones got out, but very few. I should think there was enough of them piled up at the mill to have finished the work. There was an overplus of these which I piled up myself after we had finished at the foot of the railroad slide.

I kept a memorandum of it, and if I had it, could tell exactly what the overplus was.

Very few of the caps and posts were out when we got there. Don't think there was more than 500 posts out, and a mere sample
501 of the caps. The caps and posts were light timber; the caps were 6 feet long, and 3 x 4. I think the posts were about 3½ feet long, and 3 x 4.

The posts and caps were put in the work 2½ feet apart.

I should judge that we found there, when we got there, between 70 and 80,000 feet of plank. I handled them all. I found about 30 or 40,000 feet piled up at the lower end of the railroad, and about the same quantity piled up at the head of the railroad slide.

(All of the foregoing testimony objected to as irrelevant and immaterial in regard to all of the defendants, and also in regard to the lien and the rights of parties other than the South Fork Canal Co.)

It would have been impossible to get this timber through the woods, in the first place, without constructing roads.

(Objected to as above.)

These roads were constructed at the time we got there. I
502 saw no new roads made.

(Objected to as above.)

There were two steam saw-mills there when we went there. At the mills there were sets of boring and boxing machines, a mortising machine. There were small circular saws there.

(Objected to as before.)

One of these were used by Kirk in carrying on the work.

I understood that this mill was purchased by Kirk & Co. from Kinyon

I should not think that if this upper 8¾ miles were detached from the ditch, it, the upper end, would be worth anything.

I think so because there are no mining claims up there to my knowledge; it is impossible to get manufactories up there to use the water.

I think that without this 8¾ miles, connecting the canal with the

American river, they could not have water in the canal enough for the whole year.

(Objected to as before.)

503 Cross-examination:

I do not know whether I went to work before the 1 May. I think that about the 14th or 15th of April I was on the work; it may be a a little later.

When I got up there Kirk had had some hands on the work.

When I first went up there I went over the line from the railroad slide to the upper end.

A short time after I went to work I went over the line from the railroad slide down between 3 and 4 miles, to a short distance above Oak Hill. I may not be correct on the distance it was at a slide called the Brush slide.

I should think it was 2 and ½ miles, it may not be, it may be more. After I had been there two months I went down to Oak Hill, which I think is a mile over half way from the river to Long Cañon.

504 Some time after that I went over the line from Oak Hill to Long Cañon. Never have been over that line but once. Went over it a short time before it was finished.

It was on Sunday, and I was taking a walk. I walked over it just to look at it—see the location, more than anything else.

Can't tell exactly the time that the work was completed; think it was about October.

It was about 120 days from the time I commenced working that the water was running.

We worked as many hands as we could with convenience and profit.

I don't think that as they were placed there the contractors could possibly have finished the work in less time than they did.

But by making other mills at all the points at which they could be used, and employing a corresponding number of additional hands, the work might have possibly been done in ⅓ less time.

505 (Objected to as not responsive to the direct examination and as immaterial.)

I think that a canal could be built below the present one, connecting with the upper 8 and ¾ miles of the canal, as cheap as a canal could be built on the present range of the canal.

To construct this canal below the other I should think you would have to put it as much as 20 feet below it, if put on a grade, and if on trestle-work, nearly alongside of it.

I should think that all the diggings watered by the South Fork canal are below the main reservoir.

The amount of fall lost from the regular grade of the main canal at the reservoir is between 25 and 30 feet. The amount of fall lost between the main reservoir and Coon Hollow, on the main distributing ditch of the canal, is about 60 feet—it may be more, it may be less.

The principal diggings supplied by this ditch lay lower

506 than the ditch from 10 feet to 100, and upwards.

Direct examination:

I should think the higher a ditch is the more valuable it would be.

JAS. W. TAYLOR.

Subscribed and sworn to before me this 11th day May A. D. 1860.
CUTLER McALLISTER, *Master in Equity.*

Indorsed: Filed May 30th, 1860.
CUTLER McALLISTER, *Clerk.*

507 *Deposition F. Baker.*

Circuit court of the United States for the districts of California, in and for the northern district.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL CO. *et al.*

PLACERVILLE, *May* 10, 1860.

Be it remembered. that on this 10th day of May, A. D. 1860, personally appeared before me, Cutler McAllister, a commissioner appointed by the circuit court of the United States for the districts of California, under the laws of the United States, to take affidavits and acknowledgments of bail, &c., &c., Frederick Baker, to testify and the truth to say, on the part and behalf of the compl't, in a certain suit or matter of controversy now depending and undetermined in the abovenamed court, between the abovenamed parties; and the said witness, being of lawful age, and having been by me first cautioned and sworn to testify the truth, the whole truth, and
508 nothing but the truth, in the matter of controversy aforesaid, did thereupon depose, testify, and say as follows, viz:

Present: John Hume for plaintiff; Thos. H. Williams for def'ts.

Questions by sol'r for compl't:

Ques. 1. Your name, age, and place of residence?

Frederick Baker; am 36 years of age; I reside in Placerville.

(Witness states that he is the same person who has heretofore testified in this case, and whose deposition was taken in January last.)

(Sol'r for def'ts objects to the examination, no order or direction of this court having been given authorizing it.)

When I was last examined I stated that the engineers were on the work in February; since that deposition was taken I have found a note book by which I have refreshed my memory, and would
509 state that the engineers left town to go on the work the 21st March, 1853.

I discovered this fact a day or two after my deposition had been closed, and I went to Messrs. Hume and Sanderson and told them I had made some mistakes in my deposition, and desired to correct them. I now think there was more grading done under the Gordon and Kinyon contract than what I testified to. When Mr. Kirk completed the work the ensuing year, he did a great deal of grading, and this that he did was intended, most of it, to be trestle-work, and not graded under the contract with Gordon and Kinyon.

The earth portion of the grade laid out by the engineers for Gordon's grade was pretty much all graded. Some portions of it had to

be finished up, dressed off—was not quite low enough. There might have been some little that was laid out for Gordon to grade that was not graded, but if so, very little.

510 There was considerable rock on the grade, in different portions of the line. that had the earth graded around it, but were left; this was at the time Gordon abandoned the contract. I also stated that no timber was included in the estimate that was not on the line of the canal. I still think so, but am not positive.

Cross-examination:

Mr. Gordon had removed some rock on the line; I could hardly tell what amount. He had blasted some considerable; I can't give any correct idea of the proportion of blasting and cleaning off the rock he had done.

We commenced to work on the 23d March, and work continuously when the weather would permit, tell the 20 May.

FREDERICK BAKER.

Subscribed and sworn to before me this 10th day of May, A. D. 1860.

CUTLER McALLISTER, *Master in Equity.*

Circuit court of the United States for the districts of California, in and for the northern district.

511 GEORGE GORDON
vs.
SOUTH FORK CANAL CO. *et al.*

PLACERVILLE, *May* 11, 1860.

Be it remembered, that on this 11th day of May, A. D. 1860, personally appeared before me, Cutler McAllister, a commissioner appointed by the circuit court of the United States for the districts of California, under the laws of the United States, to take affidavits and acknowledgments of bail, &c., &c., Frederick Baker, to testify and the truth to say, on the part and behalf of the def'ts, in a certain suit or matter of controversy now depending and undetermined in the abovenamed court, between the abovenamed parties; and the said witness, being of lawful age, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing

512 but the truth, in the matter of controversy aforesaid, did thereupon depose, testify, and say, as follows, viz:

Present: John Hume for compl't; Thos. H. Williams for def't.

Questions by sol'r for def't:

Taking the canal in the beginning of June, 1853, would it have been possible for any person or persons to have constructed it from Long Cañon to the American river, and completed it within the period of one month?

Ans. I don't think they could. It is hard to tell what men could do, but it does not seem possible that they could have done that.

FREDERICK BAKER.

Subscribed and sworn to before me this 11th day of June, A. D. 1860.

CUTLER McALLISTER, *Master in Equity.*

Indorsed: Filed May 30th, 1860.

CUTLER McALLISTER, *Clerk.*

513 *Deposition John Kirk.*

Circuit court of the United States for the districts of California, in and for the northern district.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL CO. *et al.*

PLACERVILLE, *May 10th*, 1860.

Be it remembered. that on this 10th day of May, A. D. 1860, personally appeared before me, Cutler McAllister, a commissioner appointed by the circuit court of the United States for the districts of California, under the laws of the United States, to take affidavits and acknowledgments of bail, &c., &c., John Kirk, to testify and the truth to say, on the part and behalf of the compl't, in a certain suit or matter of controversy now depending and undetermined in the abovenamed court, between the abovenamed parties; and
514 the said witness, being of lawful age, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, did thereupon depose, testify, and say as follows, viz:

Present: John Hume for compl't; Thos. H. Williams for def'ts.

Questions by sol'r for compl't:

Ques. 1. Your name, age, and place of residence?

John Kirk; am 45 years of age; I reside in Placerville.

I have been a stockholder in the South Fork Canal Co.

I first became a stockholder some time in 1852; I had about $2,000 worth of the stock in that year, although $7,000 of it stood in my name.

In Feb'y or March, 1854, I entered into a contract with the company for the completion of the upper end of the canal from
515 Long Cañon to the American river.

The length of line, under this contract, was something less than nine miles.

There was some material on the ground when I went there, which was delivered to me by the president of the South Fork Canal Co., and which I used in the construction of the canal.

The contract was made with me in the banking-house of John A. Reed & Co., Sac. city, by the old corporation; Dr. Harney at that time was president of the co. Of the materials given to me by the pres. of the co., there was about 60 or 65,000 feet of timber, ten-inch timber, about 300,000 of plank, and sills and braces enough for the whole line; some few caps and posts, but very few; don't think there were more than 400 posts. The sills were 3 x 5 timber. The

braces were 4-inch plank. This timber and lumber was got out by Gordon the year before, under a contract with the co.

Upon the line of the canal of his contract all the clearing and grubbing had been done by Gordon.

516 Most all of the grading had been as they first laid out the canal, except at some hard points the rock was not graded, some short pieces.

I run upon the same line as Gordon, except changed in some places; where they had prepared for trestle-work, they graded.

I have been contractor upon public works before, ever since I was 16 years of age; followed it all my life.

Upon works of this kind the engineer of the co. has a right to decide what part shall be graded and what part trestled; the work had to be done under his direction.

At the time I took possession of the contract, but about 1,000 feet of timber had been already placed in the work. There was no other material except the timber at that time in the work.

The timber was mostly at the slides, that is, the ten-inch and 4-inch timber,—a large proportion of it ran down the slides, and was lying in the slides.

The braces were hewed timber, and at the slides.

The sills were sawed timber and piled up at the mill and at

517 the head of the railroad slide.

The plank was piled up; a portion, about 200 feet, above the level of the canal; some 30,000 feet piled up at the head of the railroad slide; some 40,000 feet out at the mill below Long Cañon, or where the canal crosses Long Cañon, at the lower end of that division.

There was enough 10-inch timber got out by Gordon and Kinyon and delivered to me by the pres. of the co. to complete the work; we did not use all the timber; we got out new timber and kept the old, dry timber at the slide, and kept in there for repairs.

I should call 10-inch timber heavy timber, under a contract for heavy timber,

I should call braces, caps, sills, and posts, light timber.

At the time I took the contract there were no spikes and nails used in the work; none of that portion of the work done.

I cannot make any estimate of the number of cubic yards of excavation which Gordon made.

518 Ques. If the heavy timber was worth 40 cents per lineal foot put into the work, what was it worth in the condition in which you found it?

Ans. That in the slides would be worth 30 cents per foot. That at the top of the slides would be worth 28 cts, in the woods it would be worth 12 cts.

I should think of this heavy timber, there was 35 to 40,000 feet of it in the slides, 10 or 12,000 feet at the top of the slides, some 3 or 4,000 feet in the woods.

Ques. Considering that the light timber was worth 13 cts. per lineal foot in the work, what was it worth in the condition in which you found it?

Ans. I should say it was worth 10 cts. in the condition in which I found it.

Ques. Supposing that the plank was worth $105 per thousand feet, board measure, in the work, what was it worth in the condition in which you found it?

Ans. It would be worth about $75.

(Sol'r for def'ts objects to all foregoing testimony with
519 to the value of materials in the condition in which the witness found them, as irrelevant and immaterial, so far as the lien against parties other that the corporation is concerned, and as to the corporation, it does not form the proper basis of damages to sustain the claim of compl't.)

I did some work on the South Fork canal in 1852 and spring of 1853.

I was well asquainted with the ground embraced in the contract of Gordon & Kinyon.

I put in a bid for the contract myself; I examined the ground for the purpose of putting in that bid.

From my knowledge of contracting to get out ten-inch timber and put it where I found that timber left by Gordon, in the spring of 1853, that in the slides would be worth 25 cts. per foot, that at the top about 23 cts., that in the woods 10 to 12 cts.

To get out the light timber and place it as I found it, viz., caps, sills, and posts, would be worth 11 cts. per foot. The plank would be worth $75 per thousand.

520 (Above evidence objected to so far as affecting the question of lien and the rights of parties to the suit other than the corporation.)

Ques. Was it necessary to have constructed roads to bring this material to the line of the canal?

(Objected to as irrelevant and immaterial.)

Ans. It was; such roads had been made by Gordon before my going there.

(Objected to as irrelevant and immaterial, both as to the rights of all parties and to the lien.)

Am acquainted with the business of road-making.

I saw and used the roads made by Gordon for the purpose of hauling this lumber.

Ques. Give, as near as you can, a general estimate of the cost of making such roads in the spring of 1853.

(Objected to as above.)

Ans. About 5 or $600; not over, I should think.

Gordon and Kenyon had saw-mills for the purpose of sawing this lumber.

(Objected to.)

521 I am acquainted with the cost of putting up saw-mills at that time. There were two mills there and their cost must have been $20,000; don't think they could have been put there for less, machinery, &c.

(Objected to as before)

The cost of the slides I found at the work, taking railroad and all, must have been about $5,000.

(Objected to as before.)

I have been acquainted with Mr. Kinyon; have had very little acquaintance with Mr. Gordon; have known him since 1850. Was acquainted with Dr. Keene, pres. of the South Fork Canal Co. With Dr. Harney, a director. Was acquainted with the directors of the South Fork Canal Co. generally; in the spring of 1853, had a good deal of business with them. I knew something about the execution of the release by Kinyon in 1853. Kinyon first proposed to sell the property to James S. Law; he made a contract with Mr. Law,
522 on condition that Mr. Law could make a contract with the company to complete the work. The company thought it not advisable to enter into a contract with Law, as he had not the means to carry it out, and therefore the contract with Kinyon was not carried out.

(Objected to as irrelevant.)

Some of the directors thought it better for Mr. Kinyon not to sell to Law, as he had no means to complete the work, but to sell directly to the company.

On Monday morning the board of directors met, and Mr. Kinyon's proposition to sell to the co. was first made to the board; Kinyon made this proposition to them himself. The whole arrangement was completed Tuesday night; during this time George Gordon was in San Francisco. Kinyon left here on Wednesday morning for Sacramento; he got a mule and rode there. I met Mr. Kinyon on Thurs-
day at the horse-market in Sac. city. Kinyon remained at
523 the horse-market till I went to find if Mr. Gordon was in town; found that he was below; I then went down to San Francisco with Kinyon. A. J. Binney and Dan'l J. Lyon were along.

At San Francisco Kinyon stopped at a little house on the wharf, and left for the States at 9 o'clock the next morning in the steamer. A. J. Binney was at that time a stockholder in and engineer of the company; he was not a director of the company, and never was, to my knowledge. On the road down Mr. Binney knew that it was the intention of Mr. Kinyon to leave the State; he knew it, and talked about it.

(Objected to as hearsay.)

Mr. Binney told me he knew Kinyon was going to leave the State. He and I went down to the steamer to see him off, and did not see him.

(Objected to as immaterial as to all the parties to the suit except Binney.)

All the directors knew that Kinyon, upon the execution of
524 this release, meant to leave the State. Kinyon, by reputation, had no means at the time of the contract with Gordon and Kinyon.

(Objected to as immaterial and hearsay.)

Upon the work of Gordon and Kinyon, Kinyon acted as superintendent, and performed the duties of such office. I know this of my

own knowledge; I saw it. I was there but once. I was working upon the reservoir, at the lower end of the main canal, at the time Gordon and Kinyon were working at their contract. I was present at a conversation held between Kinyon and Capt. Smith, Dr. Keene, and Ralph Reynolds, directors of the canal co., with regard to the execution of the release. This conversation took place before the release was executed. They, myself, and Binney, the engineer, and Newell, all urged Kinyon to execute the release. Some of the directors were opposed to it, and among them Mr. Atkinson. I first urged Kinyon to make the conveyance to Law.

525 Kinyon at first objected to making the conveyance to Law.

(Objected to as irrelevant and immaterial.)

He made this objection because he was afraid Geo. Gordon would catch him before he got out of the country. The first proposition was that he should make the conveyance and leave for Carson valley. This agreement was not carried out because one of the directors objected that Law could not carry on the work—had not the means.

(Objected to as before.)

Newell, one of the directors, first advised that the assignment had better be made to the co. The negotiations about the execution of the release were carried on by the co. in their office; by Mr. Kinyon outside.

(Objected to as immaterial.)

The negotiations were to be kept secret from Geo. Gordon until Kinyon could leave the country. I knew this from the conversations of the directors of the company. Mr. Kinyon avoided Geo. Gordon after the execution of the release.

526 Cross-examination:

I expect I have an interest, either direct or indirect, in the result of this action. I have an unsettled account with Mr. Reynolds, deceased, who was one of the owners in the canal.

Ques. State the nature of this unsettled account, so far as it relates to the affairs of the canal.

Ans. It relates to our own private matters. I claim no interest in the canal whatever, either directly or indirectly. It would affect me if Reynolds would lose his interest, for the reason that it would render his estate unable to pay me. The only interest I have in this suit is an unsettled account which I have against the estate of Mr. Reynolds, which I have not as yet presented to the administrator of the estate. The administrator of that estate is James M. Reynolds.

527 In 1857 I ceased to have or claim any interest in the South Fork canal or its appurtenances. At the time I ceased owning anything in the canal, the persons owning interests in the canal other than Mr. Reynolds, were Messrs. Williams, Newell, Robertson, Sunderland, and Carr. I believe that all the abovenamed persons, with the exception of Col. Robertson, are my personal enemies, and that for the last year they have been doing all they could to ruin me. During that time I have tried to keep up even with them, and am disposed

to let them alone if they will let me alone. I have no interest, either direct or indirect, in the success of the compl't in this suit. I have taken an active part in the matter in behalf of the compl't, because they have taken an active part with Mr. Harris against Mr. Reynolds and myself. In the spring of 1858 I
528 tried to buy the claim of the compl't, Geo. Gordon, but did not succeed. I made him a proposition, which he agreed to accept of; shortly after that he backed out of it. I was trying to borrow money to pay off a debt against Mr. Reynolds upon his interest in the canal, and could not borrow the money with the Gordon incumbrance upon the canal; therefore I tried to buy it. This was before Mr. Reynolds's death. Mr. Reynolds was aware of this attempted purchase. I offered Mr. Gordon, if he would give me $30,000 and assign to me the claim on which this suit is brought, to give him one-fifth of the canal. The rest of the canal co. did not know anything about this proposition to Gordon. It was my intention to prosecute this claim, unless they came in and paid a portion of the purchase. I never had any negotiations with Gordon, either di-
529 rectly or indirectly, or through any other person, with regard to this purchase. Don't know the cash market value at that time of ¼ of the canal. From the summer of 1855 down to the date of the negotiations with Gordon I don't think the value of ¼ of the canal exceeded $30,000. I have heard that Mr. Kohler at present owns the claim of the compl't. Have heard so from Mr. Kohler. I never had any understanding whatever, of any kind or shape, with Mr. Kohler, or any one for him, in regard to this claim. Have never had any conversation with Mr. J. M. Reynolds, in which I stated that the rights of the estate of Mr. Reynolds would be protected if the compl't gained this suit. Knew nothing about the payments on the purchase of the claim by the present owner from Geo. Gordon; don't know whether he made any payment or not; understood
530 he gave property in New York. Neither I, nor any one for me, nor Mr. Reynolds, nor any one for him that I know of, advanced anything towards the purchase of this claim by its present owner.

I have no doubt that I have frequently said that I would see that the compl't in this suit enforced his lien against the works of the co. I stated so because some of the old parties were blowing around how they managed affairs, and I made the above statement to annoy them. I have stated so for the very purpose it should go to them. When I made these declarations I was not making true declarations. I have been actively engaged assisting the compl't in the prosecution of this suit, going after witnesses, &c. I went once way up in the mountains among the snow, and a damned hard trip it was, too, for a wit-
ness, and that at my own expense and without solicitation from
531 Fred. Kohler. I have not now a great deal of feeling in regard to the success of this suit; don't care a straw which way it goes.

When I made a contract with the co. in Feb'y or March, 1854, it was made with me alone; in a few days afterwards, on the purchase

of judgments against the canal, I agreed with John A. Reed, Thos. Y. Reed. D. K. Newell, Williams, and Lyle that if we purchased the canal under those judgments they were to be interested with me in the contract. I was to go on and do the work, and each one was to pay his proportion of the actual cost of completing the work.

We completed the purchase, and became the owners of the canal. I would not take the contract agreeing to take the Gordon lumber myself, but it was part of the contract that they were to furnish and deliver to me the Gordon lumber, which was afterwards done by Dr. Harney, the president of the company.

532 We used all the Gordon timber; this timber was gotten out by Gordon and Kinyon. Wherever I have spoken of Gordon's getting out materials or doing anything for the canal, I mean Gordon and Kinyon.

We did considerable blasting. We changed the line in some places. I should think we removed one-third of the rock which they ought to have removed had they completed their contract.

Taking the whole line of the contract to put up the entire flume would cost about ¼ of the whole, provided the grading had been already done.

The estimation that I made with regard to the value of lumber and timber is made upon the same basis by which I arrived at the conclusion that boards or plank, as we found them, was worth $75 per thousand.

In the spring of 1853, at the bottom of one of the slides on the line of that canal, heavy timber would be worth 25 cts. per lineal foot;

533 light timber would be worth 10 cts. per foot, and the boards or plank would be worth $75 per thousand.

All the above estimates I make from the same basis.

Lumber, at the nearest mills to where this work was going on, was worth at that time $60 per thousand; this was at mills that were sawing for a profit.

I think that at that time it would cost Gordon $75 per thousand to get the lumber out and down the slides.

Not considering the value of the mills, I should think the actual cost of getting out the lumber and hauling it to the slides, and putting it down to the foot, would have been about $50.

Just one year afterwards it cost Kirk & Co., at the same mills and slides, to get out and put down lumber $30 per thousand. It cost about $10 of that to take it from the hill and put it down the slide.

The difference in the actual cost of getting out the lumber in the two years was that Gordon worked in the rainy season, when

534 the roads were bad and it was hard to haul the lumber; also the price of labor was higher. Gordon sold one of these mills to Kirk & Co., the other he sold to another party. He also sold the shanties and railroad cars, tools and saw logs to me. I was active in carrying on negotiations between Kinyon and the co., which led to the execution of this release. At that time I had a claim against the co. for $65,000; $55,000 of it was for work and labor done. I was urging them for payments, and they kept putting me

off. I went to Gordon and told him the shortest way for him to get his money was to finish the canal; he said he would not spend another dollar on it; that he had already spent about $70,000 on it; he told me he would look after his own affairs; I must look after mine. I then tried to get Kinyon to sell the contract to Law, that Law might go on with the work, for as soon as the work stopped the cred-
535 it of the co. went clear down; it had been very low before.

The members of the board proposed that as Law had no money, and could not make it stick, Kinyon had better sell directly to the board.

I afterwards urged Mr. Kinyon to make this negotiation with the company.

Ques. State whether, after the negotiation between Kinyon and Law failed, you did not urge Kinyon to make the release to the co., so as to get Gordon and the co. into a lawsuit, and thereby postpone the collection of any claim that Gordon might have, so as to secure the collection of your own at an earlier day.

Ans. No, sir. I did it for the purpose of getting the work started, because if the work was commenced again the credit of the co. would go up.

Ques. Did you not state in the presence of the master a few
536 minutes since, in answer to a question put by me, that one of your objects in urging Kinyon to sign the release was to produce a lawsuit between Gordon and the co.?

Ans. I was alluding to the negotiation with Law and not the co.

Ques. Did you urge Alonzo Kinyon to commit a fraud against his partner?

Ans. No, sir; the board of directors did, some of them.

Mr. Newell was one of the principals; he advised the board in the management of it. Mr. Wm. H. Smith was quite active in it outside.

Ques. Did you know at that time, and before this release was signed, that Kinyon designed defrauding his partner, George Gordon?

Ans. I did.

Ques. Did you urge him to engage in the transaction?

Ans. I did, after the arrangement with Law had failed, and after the release had been proposed by the directors to Kinyon; Mr.
537 Newell told the directors that such release would be valid.

Ques. State whether about that time you did not go to Wm. H. Smith, one of the directors, and, in the first conversation had between you and Smith in reference to a release by Kinyon to the co., inform Smith that Kinyon was willing to make such release, and urge him as one of the directors to accept it?

Ans. No, sir. I went to Dr. Harney, Smith, and A. J. Binney one Sunday evening, and told them that Kinyon was willing to make this sale to Law, and urged them to make a contract for the completion of the work with Mr. Law. That evening they met Mr. Newell on the street in my presence, and stated the matter to him; he proposed that Kinyon should make the assignment directly to the co., instead of to James S. Law. We met him on the outside of his office.

Dr. Keene is dead. Ralph Reynolds left this State some time
538 in 1854, and has been gone ever since.

I don't know where Newell is; Atkinson is in this county; Harney is residing in this county.

Mr. Newell, Dr. Keene, Smith, Harney, Atkinson, Church, de Ro, and, I think, Gorham, Blake, and John Buchanan were the directors of the co. at the time of the negotiations and release.

Ralph Reynolds was a director at that time.

All the directors I do not think were present at that time at the meetings.

De Ro and Church, of San Francisco, were not here. I do not know of any others being absent. It was agreed at the time between Kinyon and the directors that the matter was to be kept secret both from Gordon and the people in this place, until Kinyon could leave the country.

(The witness desires to explain that Mr. Kinyon, in making
539 the propositions to the board whilst in session, he makes them directly to the board; all the talking to persuade him to go into this arrangement was done outside. It was arranged outside between Kinyon and the members of the board that he should go before them, when assembled, and make the propositions in form.)

My object in going to Booth & Co.'s, in Sac., to see whether Geo. Gordon was in that city or not, was because Kinyon asked me to go to see, and, I presume, he wanted to find out, as he wished to avoid George Gordon.

At and up to that time I had been on very friendly terms with Kinyon; at that time I think I was on friendly terms with Gordon; never had much business with him; had some transactions.

I had not, because at that time incensed with Geo. Gordon for his treatment to me at the interview I have referred to before.

Both Binney and I supposed that Kinyon was avoiding Gordon in
San Francisco at the time we went down together, because
540 he did not go up town. We also knew from his conversation that he was trying to keep out of Gordon's sight.

Binney and I met George Gordon as we were coming up from the steamer where we had been to see Kinyon off. I did not inform Gordon that Kinyon had left, when we met Gordon as we were going up to Montg. street; Mr. Binney asked Gordon if he had seen Kinyon; he said no, and then Mr. Binney informed him that he had left on the steamer.

Ques. State whether about the time the Reeds, Newell, and Williams became interested with you in your contract with the South Fork Canal Co., and about the time the canal was bid off by Williams at execution sale, and also during the time the work of completing the canal was progressing, and also about the time that Gordon commenced this suit, you did not state in substance to both of the
541 Reeds, and to Newell, and to Williams that the release given by Kinyon to the co. was perfectly good, and that if Kinyon had any design to defraud Gordon, or that if he had any designs of unfairness towards Gordon in the transaction, the co. did not know it.

Ans. I say distinctly that I never stated anything of the kind at any time to either of those men. We relied upon Newell to take the case for us.

Ques. Do you remember of Mr. Newell or Mr. Newell and Mr. Carr preparing an answer to be filed in this case shortly after the suit was brought, or at any other time?

Ans. I have no knowledge of Mr. Carr or Mr. Newell preparing any answer whatever. Mr. Newell, some time in the fall of 1854, prepared an answer for Read, Harney, and Smith, and myself, and a number of them. What it was I do not know.

542 Ques. Did not Mr. Newell often consult you in preparing that answer, and in regard to the facts he put in it?

Ans. No, sir. I was on the work at that time. I was very seldom in town.

Ques. Did not Mr. Newell, at his office in the town of Placerville, or at some other place, in the presence of the other parties whom you have named, or a portion of them, read the answer prepared by him, you being present?

Ans. Never to my knowledge.

Ques. Did you not state to Mr. Newell and to Mr. John A. Read that the answer which Newell had prepared was correct, and that you were willing to swear to it?

Ans. I have no knowledge of anything of the kind, of having seen the answer prepared, or of anything about it.

Ques. Do you remember, during the summer of 1854, that you and I in one buggy, Newell and D. J. Lisle in another, rode from

543 Coloma to Placerville?

Ans. I do not remember it.

Ques. Did you ever inform either of the Reads or myself that Kinyon had defrauded or attempted to defraud Gordon in making this release? If so, when and where?

Ans. I have no recollection of having any such conversation, either with the Reads or with yourself.

Ques. Did you not just give us the reverse information?

(Objected to as indefinite as to time and place.)

Ans. No, sir. When I made the contract with the co. in Feb'y or March, 1854, it was bankrupt. The company agreed to give me $165,000. I did not file a mechanic's lien on that part of the work constructed by me for the whole of the contract money.

(Objected to as irrelevant.)

At the time I took the contract, that part of the canal from Long Cañon to the American river was worth about $60,000. After

544 I finished my contract, that part must have been worth from 90 to $100,000. After the whole of the canal was completed, I think it would have sold for about $150,000, and was worth that sum. It cost Kirk & Co., or the new co., about $60,000 to complete the Gordon and Kinyon contract. In building reservoirs and other work, aside from the Gordon contract, the co. expended $20,000. The new company expended $80,000 or over in the completion of the Gordon contract, making reservoirs, repairs, and improvements on other

portions of the canal. At the time of the settlement which took place immediately after the completion of the canal, I should suppose that the new company had expended altogether in repairs, &c., about $70,000. I did, in the city of San Francisco, advise Lloyd Tevis that this claim of Gordon's was valueless, and not to buy it; if he did buy it, he would not make as much out of it as he put in.

545 This conversation with Lloyd Tevis was held in the spring of 1858, in March.

Direct examination resumed:

That part of the canal under the Gordon and Kinyon contract above Long Cañon and that part below Long Cañon, are part of the same work, and each necessary to the other. To disconnect the two portions would lessen their value to a very little. The main portion of the water, for the larger part of the year, is brought from the American river. I took the Gordon and Kinyon unfinished contract, because the company was greatly indebted to me, and the work was worth very little without the extension to the American river.

Cross-examination resumed:

Had the canal not been extended to the American, the water it got from the Cañons would have kept it full for about 3 months in the year. For the remaining 9 mo's in the year the water in the ditch might average 6 inches deep. For all the purposes of a canal, if the

546 8½ upper miles from Long Cañon up were disconnected from the rest of the canal, it, the upper portion, would be valueless.

JOHN KIRK.

Subscribed and sworn to before me this 10th day of May, 1860.

CUTLER McALLISTER, *Master in Equity.*

Indorsed: Filed May 30th, 1860.

CUTLER McALLISTER, *Clerk.*

547 *Deposition H. M. Hewitt.*

Circuit court of the United States for the districts of California, in and for the northern district.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. *et als.*

PLACERVILLE, *Jan'y* 18, 1860.

Be it remembered, that on this 18 day of Jan'y, A. D. 1860, personally appeared before me, Cutler McAllister, a master in equity appointed by the circuit court of the United States for the districts of California, under the laws of the United States, to take affidavits and acknowledgments of bail, &c., &c., Henry M. Hewitt, to testify and the truth to say, on the part and behalf of the compl'ts, in a certain suit or matter of controversy now depending and undetermined in the abovenamed court, between the abovenamed parties; and the

said witness, being of lawful age, and having been by me first
548 cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, did thereupon depose, testify, and say as follows, viz:

Present: John Hume for compl't; S. W. Sanderson for def'ts.

Questions by sol'r for compl't:

Ques. Your name, age, and place of residence?

Ans. 1. Henry M. Hewitt; am over 50 years of age; I reside in Amador county. I am acquainted with George Gordon and A. Kinyon, contractors for building the South Fork canal. They were engaged upon the work under that contract in the spring and summer of 1853. They commenced, I think, in March, 1853. I was in the employ of Gordon and Kinyon from about the 15th April, 1853, to the 4th of July; and afterwards went there some time in the fall, and
549 worked for them some 20 days, gathering up their tools, boxing them up, &c.

In the spring and summer when I worked for them I was called the superintendent by Mr. Gordon. I measured all the timber that was put in it from one end of it to the other. I had charge of locating the slides where it was practicable; seeing the timber carried down the slides, &c.

They quit work on the canal, I think, about the 7th of June. That was when most of the men quit working; about the 7th or 9th, or somewhere about there.

The most of the grading on the canal was done by Gordon and Kinyon. However, somes pots were graded after they quit working on it, by Kirk.

Kirk graded where they originally intended to put trestle-work. There was only a small amount of preparations of bearings done in the stone to put the trestle work on, or foundation for posts—that is, by the contractors, Gordon and Kinyon, as they put up but a little trestle-work.

550 There was 10-inches square timber enough got out by these contractors to finish that portion of the canal, that is, the upper eight miles, which they contracted to make. There was also timber enough to finish it.

There was also timber enough sawed for the entire cross-sills of the ditch for 8 miles. There was a few posts, not a great many, got out; can't tell for what distance they were sufficient.

For caps, there was considerable many, perhaps sufficient for two or three miles. There was no other species of timber, except planking for the flume, got out.

I am a contractor, and have followed that business nearly all my life till I came to California. I have worked a good deal on public works.

Of the species of timber that I have mentioned, the trestle-work and long sills would be called heavy timber; the short sills would be called light timber.

Sills, posts, and caps, and stringers, would be called heavy timber.

551 All the heavy and brace timbers for these 8 miles was got out.

The small cross-sills and caps over the flume and posts, would be called light timber; also the braces. I believe the prices would all be the same.

The light timber was sawed timber; was not all got out.

All the cross-sills were got, and part of the caps and posts were got out.

I took a measurement of all the timber from the time the men quit working. There was another man and my myself engaged by *by* Gordon to measure all the timber. We were to work on it until the 4th July.

I am not positive with regard to the 10-inch timber, but think there was from 70 to 72,000 feet. This was the heaviest timber that was used in the construction of the flumes. There was somewhere between 9 and 11,000 feet of timber that was got out for brace timber. I have never been a contractor myself in California. I don't know whether in California that would be called heavy or light timber, but in the States, being worked in with the heavy trestle-work, it would
552 be measured with and as heavy timber.

I don't remember how many feet of small timber there was. I call the frame for the flume small timber.

Don't know for certain how much plank there was, but to the best of my knowledge, there was about 350,000 feet of plank.

I think the whole of the 8 miles of clearing and grubbing was done. I travelled over it a great many times, and know that the way was all clear.

Ques. 2. What work was done by Gordon and Kinyon, in making roads, railways, and providing other facilities for getting the materials down to the work? What was the value of such preparations for the work?

(Ques. objected to on the ground of irrelevancy.)

Ans. There was a double-track railway made, and cars placed on it. The railway was about 1,750 feet. I think Mr. Kirk might have put a few feet to it.

Don't know the cost of making the railroad; it would require some considerable calculation. There was some considerable grad-
553 ing done. The railroad was composed of cross-ties and longitudinal rails. The centre railroad was wide enough for two cars to pass each other on the same rail. It was constructed of wood.

Wages were higher than they are now. There were some iron work and castings about the cars, which were brought up from San Francisco. There was considerable work required to make the cars.

There was another railroad which ran from the mill and met the first railroad, which was on an inclined plane. The distance of this second railroad from the mill was about two hundred yards; it might be more or less.

These were the only railroads. There were roads made through the woods in every direction, for hauling logs and timber.

The contractors also erected two good saw-mills, with tools and everything necessary for carrying on the work.

554 During the time I was there, the largest number of men that was employed on the work at one time was between 190 and 200 men. When I first got there there was from 100 to 130 men employed. I should think there was as many as 130 men employed on it at that time.

They increased the number of men as fast as they could after I got there.

To the best of my recollection, about the first of May they had from 190 to 200 men at work. This was the largest number they employed at one time.

From the 1st May till they stopped work, the number of men employed was near the greatest number.

When I speak of men, I mean all the men in Gordon's employ under wages. There was various prices paid to the men.

Three of us received $150 per month and board.

The men who were cutting wood with me as choppers, and they were about 40 in number, received $60 a month and board.

555 The head engineer received $125 per month and board. Don't know what the other 4 engineers got; I think $100 per month and board. The rest of the men got $50 per month, I think, and board

(Testimony objected to on the ground that the rate of wages paid his men by Gordon was not the true rate of wages at that time.)

I think these wages were about what was customary to be paid at that time. Don't know what it cost to board the men in the mountains at that time. The cheapest boarding-houses here, at that time, charged $8 a week; that is, boarding and lodging.

The men working for Gordon found their own blankets.

I have some knowledge of what that 10 x 10 inches timber was worth at that time.

(Sol'r for def'ts objects to witness stating what Gordon paid for timber.)

I suppose it was worth about ten cents per foot. This was

556 what he paid for it, and he got it done as cheaply as it could be done.

Some of the brace timber was got out by contract. Gordon paid for part of it 4½ cts. per foot, and for part of it 5 cts. per foot.

The other sawed timber was worth or would cost about as much as scantling tor a building.

These braces were hewed, and it was let by contract.

I can't recollect now what the contract price was for the planking.

The market price of lumber the winter before that was about $100 per thousand foot to $110.

(Def'ts' sol'r objects to any evidence with regard to market price of lumber.)

I know of Gordon's paying between 50 and 60 dollars per thousand for lumber at the mills where it was sawed, and they had to

haul it to the grade. It was thought that they had got it cheaper than men could afford to make it.

557 To where this work was being done, from this place, Placerville, it is about 16 miles; that is, to the beginning of their contract of 8 miles.

At that time it was an awful rough country.

Where Gordon had his camps the engineers of the company had placed no grade pegs, and there was a good deal of growling and grumbling.

I went and told the engineer of the company about it, and he told me there were plenty set below, to set the men at work there, and something of the kind.

(Def'ts' sol'r objects to any evidence with regard to the complaints of Gordon about the want of grade pegs.)

I think this want of grade pegs accrued about the first of May; I know they had a great many men at work and wanted grade pegs.

The difficulty of not having grade pegs by the camps is that they would have to move their camps to go and work where the grade pegs were set, instead of working on continuously.

558 It is necessary to have small camps and a great number of them, in order to push a work forward rapidly, and grade pegs are necessary at all the camps; grade pegs are necessary to know the level upon which the flume is to be put.

I recollect of Kinyon, one of the contractors, complaining to the engineers of the company, Turner and Binney, at different times, of the want of grade pegs, and quarrelling about it.

At that time Binney was chief engineer and Turner assistant engineer of the South Fork Canal Company.

Richard Corcoran was the man who assisted me in measuring timber after the men had quit work.

Examination adjourned until 11 a. m. to-morrow, January 19, 1860.

PLACERVILLE, *Jan'y* 19, 1860.

559 Examination of Henry M. Hewit this day continued.

Present: John Hume for compl't; S. W. Sanderson, esq., for def'ts.

Direct examination continued:

At the estimate made by Binney, chief engineer of the South Fork Canal Company, in June, he refused to estimate all the timber for the trestle-work that was not within 150 feet of the grade, that being the contract, as I understood from him; I was particular in finding out how much of the timber I had got within 150 feet of the grade, so that he could estimate it; of the timber prepared for the work, the proportion within 150 feet of the grade was very small.

He said that he could not or would not estimate any timber not within 150 feet of the grade.

(Sol'r for def'ts objects to any evidence in regard to the statements of Binney.)

Of the whole of the timber got out, I should think there was but $\frac{1}{10}$ part of it within 150 feet of the grade; some of the timber had been framed and put in the work by the contractors.

I think there was trestle-work put up for about one-quarter
560 of a mile.

There was quite a large amount of small cross-sills for the flume, which were prepared to be put up; this was sawed timber and framed by machinery at the mill.

The estimate that I put on the 10 x 10 timber yesterday was what it cost Gordon and Kinyon to get it out at the stump in the woods, they furnishing the axes; this 10 x 10 timber was scattered along the line of the canal from the lowest point to the upper end; we got out of this kind of timber (10 x 10) about 70 or 72,000 feet; 8,000 feet of this timber were left in the woods; the rest of this timber was hauled to slides and some of it taken down; I remember of 12,000 feet of it being run down slide No. 3.

I know that Squire Miller got from the contractors two cents a foot for hauling this timber to the top of the slides, so that it could be slid right down.

561 (Sol'r for def'ts objected to this evidence of what was paid Squire Miller.)

I thought the price paid Miller was reasonable; I offered to take it down the slides at $1\frac{1}{2}$ cts. per foot, and thought I could make money at it.

Of this timber I suppose there was about $\frac{2}{3}$ of it slid down the hill.

The brace timber for the trestle-work was hauled along with the 10-inch timber to work in with it; of this small timber, about the same proportion, in accordance with the amount of it, as of the 10-inch timber was slid down the slides.

To haul and slide this brace timber down would cost 2 cents per foot to haul it, and 1 and $\frac{1}{2}$ cent per foot to slide it down, or rather it would cost about a third as much as the 10-inch timber; to take this timber from the bottom of the slide along the line of the canal, frame it, and raise it, that is, to finish the trestle-work complete, Mr. Gordon by contract paid 16 cts. per lineal foot; I know he
562 made those contracts, and for that price; there were other men, I think, who worked cheaper than that.

Of the lumber, there was none hauled along the line of the canal; this lumber was taken on the rail cars and run down on them, and at the time the men stopped working, part of it was at the mill, part of it where the two railways met, and part of it at the lower end of the railway, down the hill.

Some of the lumber was at a mill near the mouth of Long Cañon, at the lower end of the work.

At this mill at the mouth of Long Cañon there was between 24,000 or 30,000 feet of lumber, to the best of my knowledge; I measured it all, but it is now some six years ago, and I can't recollect perfectly.

There being four different places at which the lumber was piled, I

can hardly say how much there was at each place; my opinion
563 is, however, that there was about 200,000 feet of lumber at the lower end of the lower railway, that is, the railway on the inclined plane; there was a big pile of lumber at the junction of two railways; can hardly say how much there was there; there was 350,000 feet of lumber in all.

There was not quite two-thirds of it down from the saw-mill.

There was only a small portion of the plank left at the mill, from 5 to 10,000 feet of it; the balance of it that was not down, was at the junction of the railways.

I used to run down to the foot of the railroad from 26 to 30 loads a day; there was about a thousand feet at a load, that is, of green timber.

I can hardly tell what it would cost to move the timber down; I can guess at it, however, but can hardly tell what it would be
563½ worth without going in to figure on it; I should say, if I had to answer the question at a rough guess, it would cost from $2 to $2 50 per 1,000 feet to take it down.

Taking everything into consideration, I think the contractors, Gordon and Kinyon, carried on their work as vigilantly and well as a work was ever carried on the world.

All this timber left by Gordon and Kinyon at the time the men stopped working, was taken and put into the flume, except the surplus that I spoke of yesterday.

Mr. Kirk used it, and it was delivered up to him by Dr. O. Harney; I believe he was one of the directors of the company; I was foreman of Mr. Kirk. Dr. Harney told me in 1854, at this time, that the timber was the property of the South Fork Canal Company; that they had bought it, and that I must use it as foreman of Mr. Kirk, who was carrying on the work for them.

564 I understood that Dr. Harney was at that time one of the directors of the South Fork Canal Company.

This timber was taken and used by the authority given by Dr. Harney to Mr. Kirk.

Cross-examination—questions by def'ts' solicitor:

I did not go there in the first place, but I think that the first gang of men under Gordon and Kinyon, the contractors, went to work the 16 or 18 March, and they worked until about the 7 or 9th of June, when the most of the men quit working; there was some little work done after that. All of the canal was grubbed and cleared prior to the 7th June. I think it was all done.

Kinyon's upper camp was not a mile distant from the upper end of these 8 miles of the flume.

565 There was grubbing and clearing done above the upper camp.

There was a good many places which Gordon and Kinyon did not grub and clear, intending to put trestle-work there, but afterwards, in 1854, Jas. Kirk, foreman, thought it would be cheaper to grade them, and not put trestle-work on them, which I grubbed and cleared, and afterwards Mr. Kirk grubbed and cleared many places that had been left by Gordon Kinyon for trestle-work.

I think the grubbing and clearing was all done by Gordon and Kinyon, with the exception of a few trees which I cut away for fear they might fall across the ditch. When I said that Kirk grubbed and cleared places where Gordon and Kinyon meant to put trestle-work I meant to say that he graded them, but did not grub and clear them; this was all done by Gordon and Kinyon.

To the best of my opinion Gordon and Kinyon graded over ⅞ of the whole eight miles of this work. There was some places
566 in this grading which was done by Gordon and Kinyon where the rock or boulders were not graded, which Kirk graded afterwards; also some places where there were slides. The upper slide for letting down the timber was about Randolph Cañon. Kirk did not make any new slides that I knew of. This upper slide was ⅛ or ¾ of a mile from the upper end of these 8 miles.

There was earth grading done by Gordon and Kinyon above this slide.

Don't know how much above there was graded; there was a short piece left which Mr. Kirk graded next year.

This two miles of grading that was not done by Gordon and Kinyon was in little pieces all along the line; it was not altogether at all.

The railways from the mill down at the grade, at the place where they ended, was about two miles and a half from the upper
567 end of the eight miles; that was the distance that we used to call it.

All the grading above that railroad was not done by Mr. Kirk. I could not say how much grading done by Mr. Kirk was above there.

I graded above these railroads at one place 500 to 600 feet under Kirk.

I could not tell how much of the line Gordon and Kinyon intended to put trestle-work on.

Could not give an approximate estimate of it.

According to Gordon and Kinyon's plan I should think it was intended to have two miles or more of the work on trestle-work.

I think it was intended to have the trestle-work in the highest part at 47 feet. It ran up from 6 or 7 feet to 47 feet.

Gordon and Kinyon did not build more than about a quarter of a mile, perhaps more, perhaps less. Of the trestle-work built
568 by the contractors, Gordon and Kinyon, the highest was 25 feet; there was only a few bends of this that was high.

I don't know the average height of the trestle-work built by Gordon and Kinyon.

The trestle-work built by them was at the foot of the railway slide, extending down.

According to the best of my recollection, all the brush was cut away by Gordon and Kinyon along the whole line of the ditch from the railways up, but afterwards Mr. Kirk changed the line of the ditch in some places, and had to cut away the brush.

None of the flume was built by Gordon and Kinyon.

There was some cross-sills laid down to lay the plank on, but there was not a foot of the flume finished by Gordon & Kinyon.

569 There was some other trestle-work done by Gordon & Kinyon by sub-contract, at the lower end of the line.

I can't say how much there was done there; perhaps a quarter of a mile, perhaps more. I know there was some started there.

Whenever there was trestle-work it was necessary to cut bearings for the posts.

There were some places graded by Kirk over the cañon where they commenced the high trestle-work where Gordon and Kinyon had cut bearings and intended to put trestle-work.

I can't say for what distance these bearings was cut. My impression is now that it might be for quarter of a mile, or somewhere about there.

Cutting these bearings were in some places a small item in the work; in others, on the rocks, they had to cut them in the rock.

570 Gordon and Kinyon did very little towards cutting the bearings for the whole line of the work.

Kirk & Co., I believe, completed this canal under contract with the company.

During all the time that Kirk was working on the contract I was his foreman, or rather one of them.

I hardly know the average number of laborers employed by Kirk; he had nothing like as many laborers employed as Gordon & Kinyon.

Mr. Kirk was at work under his contract from the 25th April to 1st May until about the last days of September or October. I think, however, it was the last days of September.

I was at work with a small gang of men for 5 weeks before the 25th April, when a number of men came down to work.

During the time that Kirk was working under the contract I should think the number of men working under him would average

571 about 75 men, perhaps more or less.

My impression is that under the contract Gordon & Kinyon were to have the work done by the 1st July.

I should think that the largest proportion of the laborers employed by Gordon & Kinyon came from Sacramento and San Francisco.

Since I came to this country wages have generally been lower down in the valleys than in the mountains.

I don't know what the wages were in Placerville at the time of Gordon and Kinyon's contract.

Don't know what the wages of choppers were here at that time.

Have never read the contract under which Gordon and Kinyon worked. All I know about it is hearsay. I never have heard Mr. Gordon express any wonder or astonishment at his having signed this contract.

572 Don't know of my own knowledge that *that* there was any time lost for the want of grade pegs.

Don't know whether there was any record of the estimates made. Don't know of my own knowledge of what that estimate consisted.

Know nothing of my own knowledge with regard to what amount of timber was included in that estimate; all I know about it was what Mr. Binney told me.

One of the saw-mills that Gordon and Kinyon was sold to Mr. Kirk; the other was sold to some other party.

There were but few posts to support the sides of the flume got out. These posts were sawed timber.

The size of the braces for the trestle-work was 5 x 6 inches; this was hewed timber.

I suppose there was a price named in the contract for all these various things; and when I spoke of contract prices yesterday I referred to the prices in the contract made with Gordon.

573 It was not worth as much to haul down this timber as it was to haul down the 10 x 10 inch timber. It would cost about a third as much to get the brace timber down as it would to get the 10-inch timber down; that is, in proportion to the amount delivered. I think it would cost about ten dollars per thousand to take the plank from the bottom of the railway and put it into the flume.

From the bottom of the railway to the end of the place where the plank would have to be supplied was about two miles and a half; this was the longest point. The plank was taken up to that point on cars, which were pulled up there by men.

Dr. Harney told Mr. Kirk at the time he delivered the lumber and timber to him that the South Fork Canal Company had bought it when they bought the contract from Gordon and Kinyon, and told Kirk to take it.

574 (Solicitor for def'ts objects to any evidence in regard to the delivery of the timber and lumber left by Gordon and Kinyon to Kirk, the subsequent contractors, on the ground that it is not responsive to any of the issues raised by the bill.)

At the time the contractors had the fuss about the grade pins they were in hopes that they would get the work finished very near the time specified in the contract, and thought they might get an extension of the time, and they were pushing the work forward as fast as they could.

Direct examination resumed:

The greater part of the grading done by Kirk was done in account of his changing the line. I think that the grade was better than trestle-work, and that Gordon and Kinyon, the contractors, had the option whether to put trestle-work or to grade.

575 These mills were sold by Gordon and Kinyon. I know it by Mr. Kirk using the mill that he had bought the mill and the tools, &c. I believe I have not seen Mr. Gordon since the sale.

With regard to the other mill I got a letter from Mr. Gordon or his agent to deliver up the mill and tools belonging to it to certain parties.

I can't say how much trestle-work was put up at the lower end of that contract, but suppose it was about half of a mile.

I think the name of one of the sub-contractors who put up that trestle-work was Hunt. That portion of the trestle-work had slipped my memory.

I don't think that I put in the estimates of timber heretofore made

by me in this examination—the timber, that is, the small timber used in this trestle-work, but I have estimated the 10-inch timber and planking which was used in it.

576 Cross-examination resumed:

This trestle-work was done under a sub-contract under Gordon and Kinyon.

H. M. HEWITT.

Witness recalled on the same day.

Cross-examination resumed:

In my judgment I am well satisfied that under the circumstances Gordon and Kinyon could not have completed their work in the time specified in the contract; that is, up to the first of July.

Direct examination resumed:

577 I believe the men left in consequence of their not getting their pay. Mr. Gordon told them he could not pay them at present on account of not getting his estimates.

At the time the men left, Mr. Gordon had the contract half completed.

Because I am well satisfied that Mr. Kirk completed it with less than the amount of money that Mr. Gordon had expended on it.

I don't think Gordon could have completed his contract within the specified time without increasing the number of men he had working at the time he stopped, and without a desperate effort. It was possible, however, for him to have done it with considerable extra expense and increasing the number of men largely.

H. M. HEWITT.

Subscribed and sworn to before me this 19th Jan'y, A. D. 1860.
CUTLER McALLISTER, *Master in Equity.*

Indorsed: Filed Feb'y 1st, 1861.
CUTLER McALLISTER, *Clerk.*

578 *Deposition Obed Harney.*

Circuit court of the United States for the districts of California, in and for the northern district.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL CO. *et al.*

SAN FRANCISCO, *June 9th*, 1860.

Be it remembered, that on this 9th day of June, A. D. 1860, personally appeared before me, Cutler McAllister, master in equity of the circuit court of the United States for the districts of California, under the laws of the United States, Obed Harvey, to testify and the truth to say, on the part and behalf of the def'ts, in a certain suit or or matter of controversy now depending and undetermined in the abovenamed court, between the abovenamed parties; and the said

witness, being of lawful age, and having been by me first
579 cautioned and sworn to testify the whole truth and nothing but the truth, in the matter of controversy aforesaid, did thereupon depose, testify, and say as follows, viz:

Present: J. B. Crockett and Thos. H. Williams for def'ts, and Sol. A. Sharp.

Questions by sol'r for def'ts:

Ques. 1. Your name, age, and place of residence?

Ans. Obed Harvey; I am 33 years of age; I reside in Placerville.

In the beginning of 1853, the spring and summer of that year, I was one of the directors of the South Fork Canal Co.

I was somewhat acquainted with Mr. Gordon, not intimate. Mr. Kinyon I had a bare acquaintance with. The first time I became acquainted with Kinyon was at the time he entered into the contract to construct the work. I had seen him before. I was
580 a member of the board of directors at the time the contract for the completion of the canal was made with Gordon and Kinyon.

(Sol'r for compl't objects to the examination of this witness, on the ground of incompetency.)

At the time the contract was entered into with Gorden and Kinyon, the canal was completed, or nearly so, from the main reservoir to Long Cañon, a distance of about 16 miles.

Before this contract was entered into, this part of the canal was receiving water and was in use.

(Sol'r for compl't objects to this testimony as incompetent, irrelevant, and immaterial.)

Grades and levels were furnished the contractors by the engineer, in accordance with the contract; that was his report to us.

(Sol'r for compl't objects to this testimony as incompetent
581 and irrelevant, and as hearsay.)

I have no personal knowledge of the grade pegs being set after the contract was signed. I knew of grade pegs being set there before; I know that the company instructed the engineer to set grade pegs and levels as they were needed.

(Objected to as before.)

There were two estimates made by the engineer of the work done by Gordon and Kinyon, under the contract.

(Objected to as before.)

The first estimate was paid.

On or about the first June, the 2d estimate came in, and there was about $4,000 of it paid, and some 3 or 4 days after that there was some 11 or 12,000 dollars more tendered to the contractors, making the entire amount of the 2d estimate. The $4,000 was accepted, the balance was refused.

The tender was made to Kinyon.

582 The reason he assigned for the refusal was the forfeiture of the contract on the part of the company in regard to the time of the payments of the second estimate, and also the amount of the estimate; that the engineer had not made the estimate as large he

ought to have. I don't recollect that he assigned any other reason why the contract was forfeited.

(Objected to as irrelevant.)

The money was not paid or tendered at the time of the second estimate, because of some misunderstanding between the company and its agent in San Francisco, with regard to the time at which the money was to be remitted to them.

(Objected to as before.)

The money was tendered the same evening that it was received by the company at Placerville.

(Objected to as before.)

My impressions are that Mr. Gordon was well advised as to the movements of the money, when it was to come, and when it did come.

583 My recollection is that the president of the company informed Mr. Gordon or Mr. Kinyon the reason why the full payment was not made when they paid the $4,000 on ac. of the 2d estimate.

This information was given to Gordon or Kinyon before they abandoned the contract.

Gordon and Kinyon abandoned the contract about the 7th June, 1853.

(All of above objected to as before.)

Another contract with another person was made for the completion of the work *was made* by the company, after the abandonment by Gordon and Kinyon.

(Objected to as before.)

I think I was along the line of the canal twice after the abandonment by Gordon and Kinyon, and before the work was commenced by the subsequent contractor.

There was some grading done upon the line; how much I am unable to tell; there may have been some 4 miles partially done.

584 This grading was earth grading, there was no rock grading done according to my recollection. The grading was done on that portion of the route most convenient to the works of the company. There was some grubbing done.

To grade the remainder of the canal would cost very much more than what had been done, for the reason that very little rock excavation had been done.

I don't think there was any timbers in the work at the time the contract was abandoned.

From my own knowledge, the large timber that was gotten out by Gordon and Kinyon was lying in the woods where it was cut down.

It was scattered about in the hills, some of it was perhaps 3 miles from the line of the canal; some of it, in my own opinion, could not possibly have been gotten to the line of the canal at all to be put into the work.

(Last part of this testimony objected as before.)

585 There was quite a large amount of lumber about the saw-mill; how much I do not know.

Ques. State whether or not you have had sufficient experience in such matters to be enabled to form a judgment as to the relative value of the said timber and lumber in the situation in which you saw them, as compared to what their value would have been if put into the work, according to the contract; and if yea, state your judgment on that subject.

(Ques. objected to as irrelevant and incompetent.)

I think I have sufficient experience to determine the cost of moving the timber or its relative value in the woods or in the canal, according to the contract, but I know nothing about the value of the lumber itself, what it would cost to make it. My opinion is that it would cost considerable more to bring that timber to the line of the canal than it was worth where it then was. This is in regard to the
586 timber alone. My opinion is that it would cost about as much to remove the boards and distribute them along the line of the canal where they were to be used, as they were worth at the mill. I don't think there would be much difference in the cost of removing light timber and boards.

(Answer objected to as incompetent and irrelevant, and as matter of opinion.)

Some time in June, 1854, the completion of the canal from Long Cañon up was given to Mr. Kirk. The lumber then about the mill was conveyed and delivered to Kirk by the company. I went up on the line, and as president of the company, I delivered this lumber and timber to him.

The contract with Gordan and Kinyon was declared forfeited by the board sometime between the 7th and 10th of June, 1853.

(Objected to as before.)

The company claimed damages in consequence of Gordon's forfeiture of the contract and abandonment of the work.

(Objected to as before.)

Gordon and Kinyon had erected two saw-mills from $\frac{1}{3}$ to $\frac{3}{4}$ of
587 a mile from the line of the work. The large mill was disposed of to Mr. Kirk. I understood by Mr. Gordon the company had nothing to do with either of theso mills. The other mill was disposed of to some other person by Gordon.

(Objected to as hearsay.)

I have had no direct experience in the cost of canals, ditches except as agent or director of this corporation. I have been interested in fluming, quartz-mills, &c.; I have seen a great deal of this work carried on. In regard to the construction of these works, I have seen a great deal of it, and had a great deal of experience in regard to it, but do not feel myself capable of making scientific estimates in regard to it.

Ques. From your knowledge of such work, and of the nature of the ground over which the canal was to pass, state whether or not the work which remained to be done by Gordon & Kinyon, at the time they abandoned the contract, could have been completed within
588 the contract time?

(Objected to as incompetent and irrelevant, witness not having shown that he has sufficient knowledge of the subject-matter to testify.)

Ans. I don't think it could.

(Objected to as before.)

Ques. State the relative value of the work done by Gordon & Kinyon at the time they abandoned the contract, compared with that which remained to be done under the contract; I mean the work actually done upon the canal exclusive of the cost of getting out timbers which were not used upon the canal.

(Objected to as before.)

Ans. In my own opinion, from the reports of the engineer, and from my own observation, I should say there was a very small portion of the work done, compared with what had to be done, not exceeding $\frac{1}{10}$th portion of the work, exclusive of the lumber and materials gotten out.

(Objected to as before, and also as a matter of opinion and hearsay.)

589 The supply of water that the company got from Long Cañon down, was very small. In the spring of the year I should think they filled the flume to its utmost capacity; I could not state what amount of water would be in the canal at its lowest stage.

(Objected to as immaterial.)

Long Cañon, I think, furnished a supply during the entire season; the other cañons fail.

Ques. Have you any knowledge in respect to a settlement made by the company with Gordon & Kinyon, and in respect to a release executed by Kinyon in behalf of Gordon & Kinyon, and of the circumstances under which said settlement and release were made? State fully all you know about said settlement and release.

(Objected to as incompetent and leading.)

Ans. Some time in the latter part of the month of June, 1853, Mr. Kinyon, on the part of Gordon & Kinyon, made propositions to the board of directors, I think directly to the board, to settle all

590 matters of difference between the company and Gordon & Kinyon; that they would take $8,000, which should be a final settlement; that the co. should release Gordon & Kinyon from the bond for $50.000 which they held; that this amount of money should be a final settlement between the co. and the contractors. The board of directors met, I think, at the suggestion of the att'y of the co., to consider this proposition; they refused to accept the proposition, and adjourned until the next day, when further negotiations were carried on between the company and Kinyon, which resulted in the settlement, by the company paying him $5,000, $2,000 in cash, and $3,000 in the stock of the company; the parties gave mutual releases in writing.

(Objected to as before.)

I think at that time Mr. Kinyon distinctly stated before the board that he had full authority to make the settlement; I don't know whether he was asked the question or not, but I remember he stated it.

591 I think that he had returned from San Francisco but a short time before this.

(Object to the declarations of Kinyon as incompetent and irrelevant.)

At the time Kinyon returned from San Francisco, Gordon was living in San F'co, and had not been at Placerville for some days before.

The negotiations were carried on at the company's office in Placerville, where they met for the transaction of business; that was the usual place of meeting for the board of directors.

The office was upon the main street in Placerville, near the hotel, in a one-story building erected purposely for the company, and on the ground floor.

Frequently, when the board were in the transaction of business, they had the doors closed to prevent people from coming in from time to time.

I don't recollect that there was any secrecy with regard to the negotiation with Kinyon; the door may have been closed, and may not, I could not say; if there was any secrecy, there was no more
592 than was usually employed in the transaction of ordinary business.

I don't recollect that there was any understanding among the members of the board, as a board, that the matter was to be kept secret, tho' there might have been, as was usual in many transactions or negotiations of the company.

At this time there were a great many persons who were inimical to the company, who might take advantage of circumstances to injure the company.

Don't know that there was a great many; there were some.

Adjourned until Monday, June 11th, at 9 a. m.

SAN FRANCISCO, *June* 11, 1860.

Examination of Obed Harney this day continued.

Present: J. B. Crockett and Tho's H. Williams for def'ts; Sol. A. Sharp for compl't.

Ques. State what reason, if any, you or the board of directors of the company, at the time of settlement with Kinyon, and of
593 the execution of the release by him, had to believe that in making the settlement and executing the release, Kinyon meditated any fraud upon Gordon in the transaction; if there were any such reasons, state them fully.

(Objected to as incompetent, as irrelevant.)

Ans. I had then no reasons, and knew of no reasons to believe so.

Ques. What agreement or understanding was there, if any, between the board of directors and Kinyon, or amongst the directors themselves, in respect to keeping the transaction with Kinyon secret from Gordon until after Kinyon should have left the country? or for any period?

Ans. I know of no agreement or understanding of the kind.

Ques. State whether or not you were present during the whole of said negotiations between Kinyon and the board of directors, up to the time they were completed.

Ans. My recollection is that I was.

Ques. State whether or not you have any interest in the
594 said South Fork canal, or in the result of this suit, so far as the compl't seeks to enforce a lien on the said canal.

Ans. I have no interest whatever in any portion of said canal, and have not had any since 1854; I have no interest whatever in the result of this suit, so far as the compl't seeks to enforce a lien on the said canal.

Cross-examination—ques. by sol'r for compl't:

Was a director of the South Fork Canal Co., some 3 years, from 1852 to some time in the latter part of 1854.

I was president of the company in 1854.

I don't know that I could tell when I left office; I held the office until the canal passed into the hands of the creditors of the co. Was not pres. at the time of the settlement with Kinyon; took that position about a year afterward.

I was a director at the time of making the contract with Gordon & Kinyon.

I am one of the defendants in this suit.

I am not certain whether I was president at the time the
595 suit was brought; I think I was.

(Competency of the witness objected to.)

I had not seen Gordon previous to the making of the contract.

Had no acquaintance with Kinyon prior to his making the contract. Had seen him in Placerville about a year previous. My recollection is, from what occurred at the time of making the contract, that Kinyon was not a man of much means.

I don't know that the company relied on Gordon's pecuniary responsibility, but the connexion of Kinyon with Gordon was looked upon by the board as a favorable connexion in prosecuting and managing the work, from the practical experience of the said Kinyon.

They looked to the bond given by the contractors for their security for the prosecution of the work. Don't think there were any sureties to the bond; I think that they looked upon Gordon as the man of much the most means.

596 I think they would have had some doubts about giving the contract to Gordon alone, so far as the practical prosecution was concerned.

I think at that time Kinyon was known to some of the directors, personally.

For a little time previous to the making of the contract Kinyon had resided in that county.

Can't say whether at that time the company knew Kinyon was a man of small means.

As between the two men they looked upon Gordon as the man of much the most means, and they looked upon the practical experience

of Kinyon in connexion with Gordon as an important feature in giving out the contract.

I think very likely the financial condition of Gordon and Kinyon was discussed among the directors before giving them the contract.

I think there were lower bids for the contract put in by other parties. The reason why Gordon and Kinyon's bid was accepted
597 was on account of the supposed ability of the parties to fulfil the contract. I don't know that the contract was given to Gordon because he was a rich man; the contract would not have been given to any one had he not filed a good and sufficient bond.

Gordon's was considered the best bid; could not say that it was considered the most responsible of the bids. I think there was another party whose bid was much less, who would have gotten the contract had he filed a sufficient bond.

I don't think Gordon alone could have got the contract; they looked upon him as essential to the contract on account of his supposed means.

Can't say that I knew that Kinyon did or did not have any means invested in the contract at any time.

I recollect something about a schedule of property being handed into the board; I could not say who it was handed in by; I think it was a schedule of Mr. Gordon's property; know of no schedule of Kinyon's property that was handed in.

598 I think the reason the bond was accepted without sureties was on ac't of the schedule of Gordon's property that was handed in. I think this schedule of property was read over and talked of by the board before the contract was made. I think this schedule, given under oath, was considered a sufficient guarantee of their ability to carry out the contract. I think after this schedule was handed in the co. knew the financial condition of Gordon from this schedule. They believed this schedule, and it was acceptable, altho' several of the members of the board had considerable doubts about it at the time. I think it was sworn to; I may be mistaken.

(All foregoing objected to as irrelevant and not responsive to the examination in chief.)

I think that before the abandonment of the contract the co. were aware that Gordon had the larger part of the means invested in the contract.

(Objected to as before.)

599 I remember that some time in March, 1853, a letter was received by the board demanding levels and grades. I think two letters came in to the board demanding grades and levels, but I don't recollect when, except I think in March, demanding grades and levels for whole line.

Andrew J. Binney was engineer of the co.; I think he resides in Sacramento county. I have not seen him for about a year.

I think $4,000 was paid in estimate, 1 or 2 of June, 1853—paid to Gordon and Kinyon, I can't state which; quite likely Kinyon; the balance of that estimate was nearly $12,000. The co. did not, on the 1st or 2d June, 1853, have that amount of money in Placerville; the

co. supposed they had that amount in San Francisco; I don't know, positively, of my own knowledge; my understanding was the co. had had negotiation; that the money came up to Placerville 1 June, but by some misunderstanding did not arrive until a special mes-
600 senger was sent for it; I do not know that this money was borrowed after 1st June. Moulton sued the co. for an amount of money, of which this was a part, after 1 June; I think this money rec'd at Placerville by the co. on the evening of the 6th or 7th of June, 1853. What I meant by the money being tendered was, Mr. Batterman, secretary, Wm. H. Smith, and Newell took this amount of money and went in pursuit of one of the contractors, Mr. Kinyon—Gordon not in town; they found him in his room in Eldorado Hotel. I was not present in the room and did not hear what was said; these three returned to the directors' room and reported, and their report is my means of knowledge of the said tender.

(Pl'ff here objected to the former evidence of the witness as to the tender, on the ground it is hearsay.)

I never told Gordon the arrangement the co. had made for money; I rec'd the impression from hearsay that Gordon knew of the
601 arrangement of the co. for money.

(Same objection by pl'ff.)

The amount of the 1st estimate was between $1,000 and $2,000; I think the second estimate was reported to the co. 2 or 3 of June; may have been a day or two later, I can't state precisely; think the annual meeting of the stockholders was some time in May.

There was considerable indebtedness in the company, I think, about the 1 or 2 of June, 1853; they were indebted to other parties besides Gordon and Kinyon, I should think, largely, upwards of $25,000 up to 10 June. I think quite likely the company were much annoyed by creditors at that time. They could have borrowed money in Placerville at that time, and did subsequently; think B. F. Moulton was authorized to negotiate some of the company's bonds at par if possible, or something less if he could not sell at par.

There was grading done in places along the line for a space
602 of about 4 miles, but no excavation of rock of any consequence. There had been grubbing done all along where this grading was, and in other places. I examined the line of the canal some time after they abandoned it. I delivered the timber and lumber to Kirk some time in July, 1854; from June '53 to June '54 I was only over the entire line twice, and on the works about the mill several times. I don't think I could form an idea of the entire amount of timber furnished by Gordon and Kinyon; there was a considerable portion of it not used. There was no material change made in the line of the canal in the subsequent contract; think there was less trestle-work in the Kirk contract than in the Gordon contract; in some portions of the rocky places along the line trestle-work was contemplated. A very small portion of the lumber had been hauled to the line of the canal
603 before the abandonment of the contract. The main body of lumber was from ½ to ¾ mile from the line; think the sides were 1½ inches, and the bottoms 1½ inches; the timber ranged for a dis-

tance of 3 miles from the line of the canal. I cannot state the quantity of lumber—cannot state the quantity of sills and braces; the sills and braces were from 3 to 5 inches in thickness. I do not know the cost of the timber in the woods.

I stated yesterday that in my judgment the cost of moving the lumber would be more than the value of the lumber as it lay in the woods, on account of the great difficulty of moving it; in making this estimate I could not be as accurate as an engineer or contractor; in making this estimate I do not refer to the plank at the mills. Kinyon's reasons for refusing the offer of $12,000 were not in writing; they
604 received a communication in writing from Gordon and Kinyon, giving their reasons for abandoning the contract; this was received about the 6th June, 1853; this was just before the company declared the contract forfeited on the part of Gordon and Kinyon. I don't think it was possible for them to complete the work from the time the contract was abandoned and within the contract time; the season was backward, and the force was too small to complete the work within the time. These are all the reasons that induce that opinion; my own judgment is that at that time it was almost impossible to put a force on sufficient to complete the work in the time allowed by the contract; don't know but that sufficient men might have been obtained, but they could not have worked advantageously; there were only certain parts along the line where men could camp, the mills could not get out timber sufficiently fast, and it was ex-
605 tremely difficult to get the timber down to the line; then the timber had to be distributed up the line by cars, and from that point by floating it down; the foundation and bottom boards of the flume had to be put in before the cars could be used; different gangs of men could work at the same time in grading at different parts of the canal; the two mills were within 200 yards of each other. I think the co. could have complied with the terms of the contract; it is my impression they could have made their payments; they had a revenue from the sale of water, but not a very large one. I think this was their only revenue, except their stocks. In my estimate of the work of Gordon and Kinyon it $\frac{1}{20}$ of the work to be done, I included the work along the line, and the lumber that had been hauled—not the lumber at the mills or in the mountains. There was some of
606 the grading and rock excavation, trestle-work, and putting up the entire flume that was to be done.

In making this estimate I am not as competent as a contractor or engineer; at the time of the abandonment of the contract, hardly think the indebtedness of the company amounted to $100,000; it may have done so; this is exclusive of this contract; the indebtedness did not exceed $100,000. At the time of making the release, did not know of Kinyon's intention of leaving California; do not recollect of anything being said about it in the board of directors. There may have been. The first I remember to have heard of it was the next day after the execution of the release, when some one told me he was on his way to Sacramento, and something was said about his going to the States, by whom I do not recollect; don't recollect that I was present when the

607 money was paid to Kinyon on the first estimate; I saw money paid to him once, but whether at the time of the first estimate, or the time of the release, I do not recollect which. Cannot state positively that I saw the money paid at the time of the release; was present when the release was delivered; Mr. Kenyon had no wife in Eldorado county at that time. Do not remember the exact date, but the release was delivered about 25 or 28 June; the stock of the company had some value at that time; at or about that time think it had been selling at 75 c. on the dollar, do not recollect that any one expressed surprise that Kenyon should settle for $2,000 cash, and $3,000 in stock, so soon after he had refused the tender of nearly $12,000 cash. Suppose from hearsay that Kinyon, soon after, did leave the State; do not think the affairs of the co. were considered in a hopeless and desperate condition previous to an arrangement of this kind; do not recollect that the doors of the co.'s office were closed,
608 though they might have been; do not recollect of any one being present but the board and their attorneys; think Kenyon came in the day before the execution of the release, and made a proposition to make a final settlement for $8,000. He did not remain during their deliberations on that proposition; on that day, or evening, or next morning he was notified, through the attorney of the co., that his proposition was rejected; think they had 11 or 12,000 dollars in treasury; this was the money borrowed from Moulton; there may have been some caution used as regards the silence of the board in regard to this settlement, or the negotiation for settlement, but do not recollect of any; if there was anything of the kind, there was nothing more than was usual in important transactions of that kind or importance; I had no conversation with Kenyon during those negotiations; I was not advised not to converse with
609 him; I think Smith mentioned having a conversation with him, but am not certain; think Kenyon was in Placerville all this time.

Question. About the time of the settlement, or after the settlement, did you hear any of the directors say anything in reference to having hoodwinked or got the advantage of Gordon by this settlement with Kinyon?

Ans. I do not think I did; there may have been some congratulations upon the final settlement of this matter; some of the directors were opposed to settling in this way, but were finally induced to acquiesce. Capt. Smith was opposed to it.

I do not know that any of the board of directors knew that Kenyon was practicing a fraud upon Gordon; I had no such idea or suspicion; don't think Kinyon stated who his authority to settle was from.
610 Think it was mentioned in the board whether it would be binding to settle with Kinyon without the consent of Gordon, and taking the advice of the attorney, it was determined that his power was sufficient; I do not know whether he had any special authority from Gordon; I think the question was asked him, and he stated he had authority. He exhibited no authority more than I have men-

tioned; the board knew no distinction between Gordon and Kinyon in regard to this contract.

My statement that Kenyon had returned from San Francisco was from hearsay; he had been absent from Placerville some time, and had just returned. In negotiating this settlement with Kenyon, I did not know of his having any authority from Gordon in this particular transaction, any more than his connexion with Gordon as one of the contractors, except hearsay.

These releases were prepared by the co.'s attorney; am not
611 certain whether Kinyon had an attorney. My impressions are that there might have been something said in regard to litigation with Gordon and Kinyon on account of this contract; but this settlement would be a final adjustment of the whole matter of controversy. This statement, I think, was made by the attorney of the co.

Ques. During the negotiations between the co. and Kinyon, was anything said by the directors or the attorney of the co. of Gordon's interest in the contract, or how Gordon would regard this settlement or release?

Ans. I think very likely there was something said, but on consultation and deliberation of the board it was considered that both Gordon and Kinyon were equally bound.

Ques. by sol'r for defendants:

State whether or not this was confined to the legal bearing or effect of the proposed statement.

612 Ans. It was regarded as a legal transaction, also a just one. Some members of the board thought that it was more favorable to Mr. Gordon than he was entitled to.

Resumed by plaintiff:

I could not state what was said; don't know of any one in particular talking about it. Smith had a good deal to say against it. D. K. Newell was the attorney of the board at that time; suppose he is now in the eastern States. Dr. Keene was quite in favor of the settlement, but don't think he spoke particularly. This was a special meeting; think all the members of the board were present; think it was talked over by some of the directors with some of the citizens the night before the settlement was effected; don't think I ever saw Kinyon after the release was delivered.

O. HARNEY.

Subscribed and sworn to before me this 11th day of June, A. D. 1860.

CUTLER McALLISTER, *Master in Equity.*

Indorsed: Filed Feb'y 16, 1860.

CUTLER McALLISTER, *Clerk.*

613 *Deposition Albert T. Taylor.*

Circuit court of the United States for the districts of California, in and for the northern district.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL CO. *et al.*

PLACERVILLE, *May* 9, 1860.

Be it remembered, that on this 9th day of May, A. D. 1860, personally appeared before me, Cutler McAllister, a commissioner appointed by the circuit court of the United States for the districts of California, under the laws of the United States, to take affidavits and acknowledgments of bail, &c., &c., Albert T. Taylor, to testify and the truth to say, on the part and behalf of the def'ts, in a certain suit or matter of controversy now depending and undetermined in the abovenamed court, between the abovenamed parties; and the said witness, being of lawful age, and having been by me first cau-
614 tioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, did thereupon depose, testify, and say as follows, viz:

Present: John Hume for compl't; Thomas H. Williams for def'ts.

Questions by sol'r for def'ts:

Ques. 1. Your name, age, and place of residence?

Albert T. Taylor; I am over twenty-one years of age; I reside in Placerville.

I know George Gordon, the compl't in this action. I knew his partner, Alonzo Kinyon.

I was acquainted with the affairs of the def't, the South Fork Canal Co., from its inception down to about June 20, 1853. I know of the making of a contract by the company with Gordon and Kinyon, 16 day of March, 1853. I was secretary of the co. at the time, and signed said contract as secretary. The purpose of that
615 contract was the completion of the upper 9 miles of the canal, extending from Long Cañon to the south fork of the American river.

At that time the work was completed and water running in the canal from Long Cañon to the main reservoir near Placerville, a distance of 16⅔ miles.

Prior to the time of making the contract the water had been running through the canal, except the upper mile and ⅔, for about two months.

I am not sure whether all the distributing ditches below were finished or not at that time. Gordon and Kinyon did not complete their contract. They abandoned about the first of July, perhaps sooner.

At the time the contract was abandoned I was a director of the company; had been secretary of the company up to about the 7th or 9th of June.

I know that the board of directors passed a resolution declaring

the contract with Gordon and Kinyon forfeited. I think it
616 was passed about the 28th of June; it was passed prior to the release made subsequently to them by Gordon and Kinyon.

I was present when a release was made and executed and signed by B. F. Keene, president, and George Gordon and Kinyon, by A. Kinyon.

I was present at all the debates and deliberations had by the board of directors of the canal co. while the negotiations were pending which led to this release. We received notice through our attorney that a proposition to compromise had been made to him, which information led to the negotiation.

I think the first proposition made by Kinyon was to release to the company all their claims against it on their contract for the sum of $8,000 cash and the release by the company of the bond of Kinyon and Gordon for $50,000 for the execution of the contract, which bond the company held.

The company rejected this proposition; don't know how the
617 next proposition was made, nor which party made it. The result of the matter was the execution of the release of all the claim of Gordon and Kinyon against the company for the consideration of $2,000 cash, $3,000 in the stock of the company, and the release of the 50,000 bond executed by Gordon and Kinyon to the company.

The company maintained that the contract had been forfeited, and Kinyon knew that they assumed that, and he knew that the company claimed damages on account of the forfeiture.

I don't know whether Mr. Gordon had been officially informed of the action of the board or not; don't know whether he knew of it from any source or not.

Just before the execution of the release I understood that Kinyon had come from San Francisco; don't know that I heard him say so.

Prior to this time he was in the habit of frequenting this town,
but for a few days preceding the execution of this release he
618 had been absent from town. During these negotiations with regard to the release, the company used no more secrecy in their deliberation than they did when transacting any other matters of importance.

They frequently sat with closed doors.

All the members of the board were at first averse to accepting the proposition which they finally accepted.

(Evidence objected to, on the ground that it is testimony of the defence manufactured by and for themselves.)

The board contended that they owed Gordon and Kinyon nothing, and that they had claims on them for their bond, $50,000.

(Evidence objected to as immaterial and irrelevant.)

Ques. 1. What reason or argument finally induced the board of directors to accept the terms which were finally adopted in the settlement between the parties?

(Objected to as immaterial.)

Ans. To avoid litigation and prevent delay in the execution of the

work. That if they entered in litigation with the contractors
619 it would lessen confidence in the company and delay the completion of the canal; by settling, they could re-let the work and go on and have it finished.

(Ans. objected to as immaterial.)

Ques. 2. State whether, during these negotiations between Kinyon and the company, anything occurred or was said indicating, or from which might be inferred, that Kinyon, in attempting this settlement, had any design to defraud his partner, George Gordon, or to do anything except that which appeared for the best interests of himself and partner.

(Ques. objected to, first, as leading; second, because asking the opinion of the witness and not the facts.)

Ans. No.

Ques. State whether or not you did know of any other motive which led Kinyon to make the settlement spoken of other than that which was fair and honest towards his partner, or any other member of the board of directors had any knowledge of such motive; and if so, state what the same was?

620 (Objected to as leading because purely negative, and therefore totally immaterial.)

Ans. I did not. I have stated all I know with regard to that transaction up to the time of the execution of the release.

This release was executed in the office of the South Fork Canal Co., in Placerville, Alfred Bell's building, I think.

I think the $3,000 worth of stock was issued the same evening on which the release was executed; at that meeting the order issuing the stock was passed by the board.

The stock was issued by C. C. Batterman, sec'y of the co.

I think there were quite a number of the directors present at the time it was issued. The stock was issued in the name of E. Kinyon, I think, by Mr. Kinyon's direction.

The secretary asked him if E. Kinyon was his wife, and I think he said yes.

Ques. What had been the general practice of the company in issuing stock, as to the name in which it was issued?

621 (Objected to as immaterial to the issue.)

Ans. When a person came to buy stock it was issued in any name he chose to give.

Ques. State whether or not, prior to that time, stock had frequently been issued in the name of the wife of the man purchasing or procuring the stock.

(Objected to as immaterial.)

Ans. It had.

Ques. What had been the business relations between Gordon and Kinyon up to and for some time prior to the making of this release by Kinyon, in the name of Gordon & Kenyon.

(Objected to as calling for hearsay testimony.)

Ans. The directors always considered them copartners in the contract.

(Ans. Objected to because immaterial and hearsay.)

In carrying on the work under their contract Gordon & Kinyon had a great many hands in their employ. I don't know which of the partners, Gordon or Kenyon, was here most while the work was progressing. Should think Gordon was most in town; Kinyon
622 on the line of the canal. They both appeared to be engaged in the management of the business as principals.

There was an estimate sent in by the engineer of the company shortly before the contractors abandoned the work.

This was the last estimate sent in. I think that estimate was about $15 or $1,600. There was payments amounting to about 4,000 made upon it.

The payments were made a day or two after the estimate was sent in; don't know whether they were made to Gordon or Kinyon.

Cross-examination:

I am the A. T. Taylor who was a director of the South Fork Canal Co. in June, 1853. I was elected such for the year next ensuing, on the 7th or 9th of June. I was a director of the company at the time the contract with Gordon & Kinyon was declared forfeited, and at the time the release was executed. I am the A. T. Taylor named in this suit as a defendant.

623 (Sol'r for compl't objects to the competency of this witness.)

Previous to the making of the contract with Gordon & Kinyon had known Alonzo Kinyon about 5 months.

Ques. What was his reputation as to financial ability at the time of making this contract?

(Objected to as calling for hearsay and immaterial testimony not responsive to the examination in chief.)

Ans. I don't know.

I am not aware that in 1854 I wrote a letter to George Gordon in which I stated that I knew the reputation of Mr. Kinyon for financial ability.

I don't know the opinion of the co. at the time of making the contract as to Kinyon's means.

I am not aware that I wrote a letter to George Gordon in 1854 or 1855, in which I stated that the company thought that Kinyon had no means.

Ques. Did not Kinyon represent at the time of making the contract, and other times, that George Gordon had the money
624 in the contract, and that he had little or nothing?

(Objected to as immaterial.)

Ans. I have no recollection of such representations.

I think I did not, in a reply to a letter to George Gordon in 1854 or '55, state that he did so represent.

Ques. State whether, at the time the bond was executed to the South Fork Canal Co. by Gordon & Kinyon for the fulfilment of their contract, the company did not require from Gordon a schedule of his property.

(Objected to as immaterial.)

Ans. No, they required sureties; he proposed to give them a schedule of his property under oath, and in accordance therewith a schedule was made out; the co. considered it sufficient, and accepted it without his qualifying to it.

Mr. Kinyon presented no schedule.

(Objected to as before.)

Ques. At the time the contract was let to Gordon & Kinyon, were there any bids at a less sum for the work?

(Objected to as before.)

625 Ans. I am not positive, but I think there were. If there were lower bids at that time made and not accepted, it was because they were not responsible.

(Objected to as before.)

I cannot say, without reference to the contract, what it was estimated at that time that the contract would amount to.

I see by the bond that it was estimated that it would amount to $175,465.

(Objected to as immaterial.)

I think that about the 18th or 19th March, 1853, the company received a letter from Geo. Gordon & Kinyon demanding the grades and levels of the entire line.

(Objected to as calling for the contents of a written document which should be produced, and as immaterial.)

Ques. State whether shortly after the 1st letter, say about the 24th or 25th March, the co. did or did not receive a letter from A. Kinyon demanding also grades and levels, the body of that letter in the handwriting of Judge Hale.

626 (Objected to as above.)

Ans. I don't know whether such letter was received; we received a good many letters from Gordon & Kinyon; the dates and nature of them I do not remember.

Ques. Did you not, in a letter to Geo. Gordon, state that the letter referred to in above question had been received by the company about one week after the receipt of the letter from Geo. Gordon & Kinyon just spoken of above?

(Objected to as before.)

Ans. For certain reasons I think I did not write it, but don't know whether I did or did not.

Can't tell, without referring to the records, when the first estimate was made on the Gordon & Kinyon contract.

Don't remember the amount of the first estimate. It was paid when it was due. Can't state, either, when the second estimate was made and reported to the company. Don't think it was about the 1st June, 1853. Could not fix the date of it without the record. Don't know the amount of the 2d estimate. I re-

627 member of an estimate presented by the engineer about the middle of June, amounting to about $16,000. The South Fork Canal Co. did not have the money in the treasury to pay that estimate when it was presented. I remember Mr. Hume coming to the co.'s office, and demanding that money for Gordon. This was

after the making of the estimate. Part of the amount was paid, but whether to Mr. Hume, or Gordon and Kinyon, I don't remember; about $4,000 was paid on that estimate, I think. The meeting of stockholders for that year for election of directors transaction of general business, was held 7, 9, or 11th of June—am not positive which. Don't recollect whether or not the directors reported to the stockholders at that meeting that the co. were indebted to Geo. Gordon and Kinyon about $16,000. I think I did not write a letter to Geo. Gordon in 1854 or '55, in which I said that the sec'y read a statement to the meeting of stockholders, in which the
628 probable amount of the estimates about to be presented in behalf of Gordon and Kinyon was $16,000. Mr. Binney and other directors of the co. did not, at that meeting, report that Gordon and Kinyon had made satisfactory progress under their contract. I think I did not, in the letter above alluded to, write Gordon that Binney and one of the directors reported to the board that the work was being prosecuted beyond their most sanguine expectations. I know that Batterman, the sec'y, was instructed by the board to inform Gordon and Kinyon that their contract was terminated, and work done forfeited to the company. Don't remember the precise date of this order; it was some time in June after the election of new officers.

Ques. At the time Gordon and Kinyon suspended work on the canal, how much did the co. owe, independent of their contract with Gordon and Kinyon?

(Objected to as immaterial and irrelevant.)

Ans. I don't know; I don't know that I ever knew;
629 can't state with any degree of exactness; don't think it was equal to $100,000. The execution of the release was made either in the morning session or the evening session; we had both. The stock, I think, was issued in the evening. The evening session was closed at the usual hour of evening sessions; this was 9 till 11. At the time of the execution of this release I did not know that Kinyon was going to leave California. I don't know what was known to the members of the board.

I think that I did not, in the letter to Gordon before referred to, in answer to a question, Did not the members of the board know that Kinyon was going to leave California? answer, yes.

The transactions of the board with regard to this release were made with closed doors. It was not agreed between Kinyon and the board that nothing should be said of it until the affair was terminated.

Don't know whether the $2,000 cash was paid to Kinyon in the evening or morning session; think it was paid him in the evening.

I do not recollect, but I might, in the letter before alluded
630 to, have stated that the money was paid at 9 or 10 o'clock p. m.; it might have been later.

Direct examination resumed:

To the letter from Gordon and Kinyon asking for grades and levels, the board referred them to the engineer. Am not certain that this re-

ference was made by letter; but the contract called for the work at such times and places as the engineer directed, &c.

(Objected to as incompetent.)

Am not sure whether any direct answer was made to the letter; if so, he was referred to the engineer.

At the time of the $16,000 estimate the co. had an agent in San Francisco for the purpose of selling stock and borrowing money on bonds, and they thought they had this amount in his hands at the time; and this amount arrived here within two or three days after the estimate was accepted. I know that at that time they had about $4,000 in the treasury at Placerville; don't know that they borrowed it at all.

631 They borrowed money of Aitchinson at one time; don't know whether it was at or before this time. Don't know the amounts. I think they borrowed the balance of the money to make the $16,000 from Ben. Moulton, but am not positive.

A. T. TAYLOR.

PLACERVILLE, *May* 10*th*, 1860.

Witness recalled. Same parties present.

I never had any conversation Mr. Kinyon with regard to the execution of the release, either out of the board or in it. In the board I urged the acceptance of his proposition, simply to avoid litigation and enable us to go on with the work. I think I have no knowledge of Mr. Kinyon's intention to defraud his partner Gordon, or of his intended departure from the State. I did not know of any member of the board, either in or out of the board, urging or persuading Mr. Kinyon to execute this release.

(Testimony objected to as irrelevant.)

632 Cross-examination:

Ques. Look on page marked 3, in the lines marked answer to ques. 16—being the 8, 9, 10, and 11th lines on that page, which is now shown you—and state whether you recognize the handwriting on those lines.

The witness declines answering the question until he can see the whole document, of which the above is a paragraph.

(The witness declines answering the question because the sol'r for compl't states that he offers the document to impeach the witness.)

The witness states that he could not answer this question positively without seeing the whole of the document.

The document is here shown to witness.

I recognize the handwriting; I think I wrote it in 1854 or 1855.

Ques. The document is in the shape of question and answer. What portion of it did you write?

633 Ans. I did not write any of the questions, and I think the answers in the document are all in my handwriting. This was written to George Gordon.

Sol'r for compl't now offers the document in evidence, which is marked Exhibit A, attached to this deposition.

A. T. TAYLOR.

Subscribed and sworn to before me this 10th day of May, A. D. 1860.

CUTLER McALLISTER, *Master in Equity.*

Exhibit A.—C. McA.

1. Were you secretary of the S. F. C. Co. in 1852–'3?

Ans. Yes.

2. Do you recollect 16 March, when Geo. Gordon and A. Kinyon signed contract with S. F. Canal Co.?

A. I do recollect of their signing the contract. Think it was in March.

634 3. How many bidders for the work were *were* there below G. G. and A. Kinyon?

Ans. Don't know exactly; there were several, perhaps three or four.

4. Why was the contract not let to the lowest bidder?

Ans. Because they were not considered responsible men, or because they could not give bond for the completion of the work.

5. Was it not let to Geo. Gordon and A. Kinyon because it was known or believed that G. Gordon had the money to put it through?

Ans. Yes.

6. In the bond G. G. and A. K. gave, was not the entire security considered as being in Geo. Gordon's name?

Ans. Yes.

7. Was G. G. not required to hand a schedule of his property to a large amount and take his affidavit thereto.

Ans. I don't know that he was required, or that he made affidavit. The schedule was before the board, and was considered by them sufficient security, and was no doubt the ground upon which

635 the contract was awarded to them.

8. What was the opinion of the company as to Kinyon's means?

Ans. It was that he had none.

9. Did Kinyon not represent then and at other times that Geo. Gordon had the money in the contract? That he had little or nothing?

Ans. He did.

10. Was not the company, at the time of letting this contract, heavily in debt on accrued and accruing liabilities, and how much?

Ans. It was; do not know how much.

11. Had the company at the time of letting this contract any money in their treasury to pay either it or their other debts?

Ans. It had not.

12. Had they subscriptions to stock made so as to pay this contract ($175,000) and their other indebtedness?

Ans. They had not.

13. On or about the 18th or 19th of March did not the company receive a letter from Geo. Gordon and A. Kinyon, demanding the grades and levels of the entire line of their work?

636

Ans. The company received such a letter soon after the contract was signed; do not remember the precise date.

14. On or about the 24th or 25th of March did not the company receive a letter from A. Kinyon, demanding the same thing? (This letter was in Judge Hall's handwriting.)

Ans. The company rec'd such a letter from Kinyon about one week after the rec'pt of the one from G. G. and K.

15. When Kinyon and Geo. Gordon took the contract, were they considered a firm, or only two individuals jointly taking a contract together?

Ans. They were considered as a firm for the specific business of constructing the canal, the board believing them equally authorized to transact business pertaining thereto.

16. Prior to the first of June did you ever hear the directors or trustees say and expect that Gordon and Kinyon would not be able to finish the contract by the 1st July, and that their bond would be forfeited, or that they would be compelled to go on and finish the work without any more advances of money?

637

Ans. I did hear some talk of the above nature; the same founded upon letters received from G. G. and K., stating that they could not complete it by that time, and assigning as a reason the impossibility of getting hands, rendered so by the general bad reputation and discredit of the company. (Letters now on file in the office.)

17. On the first of June, when the estimate of Gordon and Kinyon came round, had the company money to pay them?

Ans. The first estimate of 1st May was paid on presentation; the second estimate, I think, was not made so early as the first of June, but the company did not have the money on the day of presentation of estimate.

18. On the 6th June, at the stockholders' meeting, do you recollect the company, in their report, acknowledging themselves indebted to Geo. Gordon and A. Kinyon $16,000?

638

Ans. The board made no financial report at that meeting; the secretary read a statement in which the probable amount of the estimate about to be presented was $16,000.

19. Did not Capt. Smith and A. J. Binney, in their address to the meeting, report that Geo. Gordon and Kinyon had made satisfactory progress in their contract?

Ans. Do not recollect their remarks on that day; had heard them report to the board that the work was being prosecuted beyond their most sanguine expectations, but not with sufficient force to secure its completion by the first of July.

20. Do you know whether on or about the 15 or 16 June, C. C. Batterman, secretary, notified Geo. Gordon and Kinyon that their contract was terminated, and the work done forfeited to the company?

Ans. I know of C. C. Batterman giving such notice, but do not remember precise date; could tell by consulting journals.

21. At the time Geo. Gordon and Kinyon discontinued their contract, how much did the company owe, independent of the amount of their contract?

639 Ans. The August meeting report stated $170,000; I do not know; was not present at the August meeting.

22. Had the company money on hand or stock subscribed to pay this indebtedness?

Ans. No.

23. On or about the 25 to 28 June do you know whether or not Kinyon offered to sell to the company *his* interest in the contract?

Ans. He did.

24. Were you present when Kinyon signed the release in full of of all demands in the name of Geo. Gordon and Kinyon? What day was it, and what time of day or night?

Ans. I was; it was quite late in the evening; do not remember the date; could tell by examining journals.

25. Was it known amongst the board that Kinyon was going to leave California?

Ans. Yes.

26. Was it agreed to keep the release secret until he had time to get away—agreed either amongst the board or between the board and Kinyon?

Ans. The board sat with closed doors; nothing to be divulged till the negotiation was closed, and release, if accepted by board, was executed.

640 27. Was it not the generally prevailing feeling in the board that Kinyon was, in the compromise, defrauding Gordon?

Ans. No, I think not; they believed that they had the legal advantage of G. G. & K., and that a lawsuit would injure him and Kinyon. The object of the compromise was (on the part of the co.) to prevent a long and angry lawsuit.

28. How much was paid to A. Kinyon for this release, and in what was it paid? How much cash and what else? and at what time (hour) was the payment made?

Ans. Five thousand dollars; $2,000 in cash, $3,000 in stock of the com.; payment made about nine or ten o'clock p. m.; it might have been later.

29. Do you know who it was induced Kinyon to make this compromise?

Ans. Don't know that any one induced him to do so; think it was his own proposition.

30. Was it not the argument amongst the board that Kinyon's release would be good against Kinyon's interest at all events,

641 and they would take the chance of its holding Gordon's interest?

Ans. No; the trustees did not consider Kinyon's interest alone worth anything; they believed the release good against both.

31. State any other particulars that you know connected with this

release, and what Kinyon said and did in making the offer of sale, or in carrying it out, or what the officers of the company said or did in the premises.

Ans. Can give no volunteer statements; anything called out by proper legal inquiry would be answered truly; have no interest in the company.

32. Do you know whether any money was coming to Kinyon at the time he left on the Coon Hollow work, or from Law and Kinyon, and how much?

Ans. There was none; he had overdrawn, I think, on both.

33. Was anything paid Kinyon on or about the 28th June on the above acc'ts? Did he sign off a receipt in full, and where?

Ans. No, there was nothing paid him; think he receipted his estimate after accepting it in full; bills for all extra work are excepted in full and are on file.

34. Do you know of his coming into the office and repre-
642 senting himself without money, and asking for $100 to go down to see Gordon, about 20th or so June?

Ans. Yes.

Indorsed: Filed May 30th, 1860.

CUTLER McALLISTER, *Clerk.*

Deposition William H. Smith.

Circuit court of the United States for the districts of California, in and for the northern district.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. *et al.*

PLACERVILLE, *May* 11, 1860.

Be it remembered, that on this 11th day of May, A. D. 1860, personally appeared before me, Cutler McAllister, a commissioner appointed by the circuit court of the United States for the districts of California, under the laws of the United States, to take affidavits and acknowledgments of bail, &c., William H. Smith, to testify and the truth to say, on the part and behalf of the def'ts, in a certain
643 suit or matter of controversy now depending and undetermined in the abovenamed court, between the abovenamed parties; and the said witness, being of lawful age, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, did thereupon depose, testify, and say as follows, viz:

Present: John Hume, esq., for compl't; Thos. H. Williams, esq., for def'ts.

Questions by sol'r for def'ts:

Ques. 1. Your name, age, and place of residence?

William H. Smith; I am about 48 years old; I reside in Placerville. I am the Wm. H. Smith, who in 1853 was a stockholder of the So.

Fork Canal Co. I was director of the co. during the year 1853. I am the William H. Smith named as def't in this suit. I was served with process in this suit. I presume I was served with process. I never read it.

644 (Sol'r for compl't objects to the testimony of the witness, on the ground of the incompetency of the witness.)

I know the compl't, George Gordon. I know Alonzo Kinyon. I remember that a contract was made between the co. and Gordon and Kinyon for the completion of the canal between Long Cañon and the American river. The canal was completed to Long Cañon, and receiving water a long time previous to the letting of contract to Gordon and Kinyon. I remember about the time that Gordon and Kinyon abandoned the contract, when Gordon notified the co. that he should abandon the work; this was some time about the fore part June, 1853. I did not go upon the line of their contract after they had abandoned it. I was up there a short time before they abandoned their contract. At that time I had some knowledge and experience in the work on which they were engaged.

My experience and knowledge was in seeing contracts let
645 and work carried on, and engaging in work of that kind myself. At that time I don't think it was possible for Gordon and Kinyon to have completed their contract within the time specified in the contract.

(Objected to as immaterial.)

From Long Cañon down, I think the cañon all would supply the ditch with $\frac{1}{3}$ of its capacity in water for six months. They would not fill it for three months in the year. They would only fill it when it rains. In an ordinary season, when supplied by the waters of the cañon alone, I have seen the water down to four inches on the bottom. This was in 1852. I remember the release executed by Kinyon, in the name of Gordon and Kinyon, to the South Fork canal. The first that I knew in regard to Mr. Kinyon wishing to settle the matter, Kirk came into the South Fork office where I was, and called me out of the back door into the yard back of the office; he told
646 me there that Kinyon was here, and wished to settle this matter. I asked him in what way he wanted to settle it. He told me that Kinyon was willing to settle it for $8,000, part in money and part in stock of the co. I told Mr. Kirk that I thought it would be bad policy to settle in that way; that Gordon and Kinyon had forfeited their contract, and I thought it would be better to settle it in another way. Mr. Kirk then remarked to me that if it was not settled, there would be a long lawsuit about it. That the work would stop, and the canal be attached, and that the work could not be carried on. He remarked that it would be much better for us to do it. I told him then that I would see what the other members of the board concluded upon, and would act accordingly; then we came in.

(Testimony objected to as hearsay and incompetent.)

I think that I spoke to some members of the board about it, and they seemed to be in favor of a settlement; some one or two
647 dissenting.

The board was called together for the purpose of hearing Mr. Kinyon's proposition. Kinyon was called in after the board had assembled. He made an offer to the company to take, I think, somewhere about $8,000, and the co. to relinquish the bond which they held against Gordon and Kinyon, and that the co. should hold the material that was then upon the work, according to contract. The board concluded not to accept of that offer. They offered to give $2,000 cash, and $3,000 in stock, and relinquish the bond, which offer was accepted by Kinyon. I never spoke to Mr. Kinyon on this subject outside of the board, nor inside either that I recollect of. All I said on the subject was addressed to the president and members of the board assembled in meeting. I opposed the settlement of the matter.

(Objected to as immaterial.)

648 I agreed to the settlement by the advice of the att'y of the co.

(Objected to as immaterial.)

I objected to the settlement for the reason that Mr. Gordon had not fulfilled his contract, and that the company held his bond, and he was thereby liable to the co., instead of the co. to him.

(Objected to as immaterial.)

The inducements held out to me by the att'y of the co., which induced me to agree to the settlement, was that suit would be commenced, the work attached, and that there would be a long lawsuit, and that the completion of the work would be postponed a length of time.

(Objected to as immaterial and hearsay.)

The att'y also told me that if the matter was settled, then the work could be re-let and finished, and the company would have the benefit of it.

(Objected to as before.)

The public position of the office made it important for the board, whenever they transacted business, to sit with closed doors, and they did so. I think there was no more secrecy in the conduct of

649 the execution of the release than there was in any other matter. Among the members of the board it was agreed that nothing was to be said about this matter until it was concluded. The purpose of the directors in making this agreement of secrecy was that there were some persons in town who were always trying to injure the co., and it was to prevent their interference in these negotiations. This agreement of secrecy was made by the directors at their own instance. Don't know that Kinyon had anything to do with it. The negotiations were pending, before their final settlement, from one evening until next morning. If I recollect aright, the first proposition was made in the evening and rejected. The second offer was made, taken under consideration that night, and accepted next morning, and Kinyon was then called in, and informed the board

650 that he would accept their offer. The release was executed some time in the fore part of the day. I don't know with regard to the other members. So far as I am concerned, I did not know that Kinyon desired to defraud or wrong his partner, George Gordon,

in the execution of this release. I regarded the transaction as a fair one, so far as the company was concerned. I had no knowledge, prior nor at the time of the execution of the release, of any design or intention of Kinyon to secretly leave the State, or to leave the State without the knowledge of George Gordon. So far as I was able to judge, Gordon and Kinyon were acting as partners under the contract. I remember when the last estimate was sent in, just preceding the abandonment of the contract by Gordon and Kinyon; I remember that a portion of the last estimate was paid. The first estimate was all paid.

651 The balance due on the last estimate was tendered to Kinyon at the Eldorado Hotel, Placerville. I think Dr. Harney, Mr. Batterman, and one other director, with myself, made the tender. The money was in a bag in American gold coin. We found Kinyon in his room; told him that we had the money to pay the balance of the estimate; wished him to take it. Whether the bag was opened or not I can't say, but think it was, and the money exhibited. I did not, of my own knowledge, know the amount of money in the bag. Don't know whether the treasurer had counted it; was just as it came up in the express. We stated to him at the time that we had the full amount. I supposed at the time, by the size of the bag, that we had the full amount that we stated we had. We had a light with us, and it was sufficient by which to count the money. Kinyon replied that he could not receive it; that the co. had forfeited their contract, and that they should hold the company responsible.

652 He made no objection in regard to the time or place at which the tender was made.

His refusal was solely based upon the ground of the forfeiture of the contract by the co.

I recollect of having a conversation with Mr. Gordon once or twice, with regard to the contract; what the conversation was I can't bring to mind. I recollect of his expressing that he could not conceive how he was led into signing such a contract; that it was the most absurd thing he ever did in his life; that he was throwing himself into the power of the engineer of the company, and that the engineer could control him; this is all I remember.

(Objected to as irrelevant and immaterial.)

Cross-examination:

I never engaged in the business of contracting an public works; have no experience in regard to it. I mean by public works, government works.

653 All the work that I have ever had anything to do with was on these ditches here, South Fork Co. and Gold Hill. Never had anything to do with those works as contractor.

I was upon the works covered by Gordon's contract some ten or fifteen days before—a short time before he abandoned his contract.

I went all over his contract, to see what he had done. Don't know whether I saw all the timber he got out or not. I went over the whole line, as far as there was any work done. I went over it from within between ¼ and ½ a mile of the upper end of the line to Long Canon.

When I state that Gordon could not have finished the work in a month, I give my opinion.

When Kirk called me out of the So. Fork Co.'s office, as I stated before, I think it was about 11 o'clock in the day. I had no conversation with any other person about this release outside of the co.'s office, except with Kirk.

654 Had conversations with other directors about this matter inside the office, when the board was not in session.

After the matter had been discussed in the board the second time, Mr. Kinyon was called in.

He was called in in the morning session. That was the morning after my conversation with Kirk.

Don't recollect whether the sec'y or one of the directors went out and brought Kinyon in; he was outside, in town somewhere, and the board knew it.

I can't say, but presume it was one of the members of the board who notified the board that Kinyon was in town, and ready to accept or propose an agreement.

The evening before a proposal was made to the board by Kinyon, the board would not accept, and the board made a proposition to him which was pending through the night, and at the time he was sent for next day.

655 I did not sign the release; it was signed by whoever was president at that time. I don't know whether I was in the office or not at the moment the release was signed. I hardly think I was.

Can't say who wrote the release. The agreement with Kinyon was consummated in the morning.

I can't say whether the release was prepared for signing at the time the agreement was consummated.

I don't think I was present at the time the money was paid. I think it must have been paid *it* in the morning, as the order for payment was passed at the meeting in the morning.

The matter was passed upon in the morning session, and the stock was issued the same morning that the agreement was consummated, and therefore I should think that the money was paid in the morning.

After the meeting I left the office, and in a short time after I returned, and was informed that the whole matter had been consummated, the release signed, money paid, and stock issued.

656 Never saw Kinyon after that morning; do not know whether he left town that morning or not.

At the time of the execution of this release I did not know that Gordon was threatening a lawsuit.

I myself thought that unless this agreement was made the co. would be involved in a lawsuit; and such was the advice of the att'y of the co. I myself would have never consented to the arrangement had I not feared that the work would be stopped on account of the suit with Gordon.

I don't know whether at that time Gordon had filed his lien on the work or not.

Previous to the contract with Gordon and Kinyon, I had known Kinyon some 8 or 9 months.

Can't say whether he was a man of means. He had not the reputation of being a man of means that I know of.

(Objected to as irrelevant and immaterial.)

657 The tender was made to Kinyon between the hours of 9 and 10 p. m., or about 9.

I do not know whether he was in bed at the time.

He was partially undressed. Don't know whether he had on his pantaloons.

Direct-examination resumed:

Have been engaged in the business of constructing and managing ditches for about six years.

W. H. SMITH.

Subscribed and sworn to before me this 11th day of May, A. D. 1860.

CUTLER McALLISTER, *Master in Equity.*

Indorsed: Filed May 30th, 1860.

CUTLER McALLISTER, *Clerk.*

658 *Deposition G. R. Turner.*

In the circuit court of the United States for the districts of California, in and for the northern district, in equity.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL COMPANY *et al.*

Be it remembered, that on this 5th day of October, A. D. 1860, at San Francisco, in the district aforesaid, before me, John B. Williams, a commissioner duly appointed by the circuit court of the United States for the districts of California to take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil causes depending in the courts of the United States, pursuant to the acts of Congress in that behalf, personally appeared George R. Turner, a witness produced in behalf of the defendants in the above-

659 entitled cause, the usual notice of examination being waived by the solicitors for the complainant; and the said witness, after being duly sworn, testified as follows:

Present: Messrs. Crockett and Crittenden, by Thomas H. Williams, esq'r, for defendants; and Messrs. McDougal and Sharp, by John Hume, esq'r, for complainant.

Questions in behalf of defendants:

Question 1. State your name, age, residence, and occupation.

Ans. George R. Turner; age, 33; residence, San Francisco; occupation, city and county surveyor.

I am a civil engineer by profession; I have followed that profession about 14 years.

I know the South Fork canal in Eldorado co., near Placer-
660 ville. I have done professional work upon it. I was there from the 3d or 4th Nov., 1852, until the 3d July, 1853. I was first assistant engineer on the works, under Andrew J. Binney, the chief engineer.

I done work as assistant engineer on the canal from the Long Cañon to the American river. I think I commenced work on the 26 March, 1853, on that line. Stakes every two rods had then been placed along the whole line, and I presume they were commenced at the cañon and run up to the river. The grading could have been done on a portion of this line by these pegs; on another portion not, as some error had been made. I don't recollect the distance which this error affected. I think the pegs were about two feet too low.

It could have been corrected, as the work progressed, by a
661 competent man as foreman. All that was necessary was, to raise the sills two feet as the work went on. In all works of this character it is not expected that the work will be exactly on the grade at first; levels have to be taken, and the work trimmed up to effect this. I commenced at Long Cañon and put in grade pegs every two rods, until I reached the river, except where, by reason of bends or from other cause, it was necessary to place them closer. These pegs were for the contractor to work by in digging his first excavation. These pegs were located on the same line the others were, except at the place where the error had been made. They were placed for the laborers to work by. This is the duty of the engineer.

I remember when the first party of hands came up under
662 Gordon and Kinyon to work under the contract. It was two or three days after I got there.

The first I saw of the party was one night when I came up from my work and saw their camp on my way to my own. I had then worked up from 3½ to 4 miles above Long Cañon. At that time they had not commenced work on the line. I don't remember where they commenced. I kept on with my work until I struck the river. It was about a month from the time I commenced until I struck the river. There was not any brush cut when I done my work. I did the first of that kind of work, but only enough to enable me to go on with my surveying.

The first work necessary for a contractor to do upon the line of a
663 canal would be to remove the brush, grub it up, and remove trees. The first line of stakes would be sufficient for this purpose, and would indicate the line of the work accurately enough. There was no delay, while I was there, such as would prevent Gordon from working his hands. I made the survey to the river, then went to Placerville, and soon afterwards returned to take charge of the construction, so far as engineering was concerned. I was absent at Placerville a day or two only.

During my stay on the work there was nothing wanted in the engineering department which caused any delay to the contractor whatever. I remained until Gordon gave up the contract and quit work. I don't suppose I done any work after Gordon threw up. After lo-

cating the line I stayed there for the purpose of going up and
664 down the work, to see that it was properly constructed, and to furnish new pegs when any of them had been lost, displaced, or destroyed from any cause, and in work of that character generally. When pegs were lost or displaced from any cause, they were in the habit of sending me word, and I would go and replace them.

Cross-examination:

I don't know where the pegs I spoke of were set. I suppose they were those of the preliminary survey; I mean the pegs which were there when I went up.

The canal had already been constructed from Long Cañon down, when I went up. The work by Gordon was all done after the survey made by me. He did no work in advance of the survey made by me.

All the grade work done by Gordon was done according to
665 the grade pegs set by me. I set an entire new set, without regard to the old ones.

All the grading was done by the new pegs, the old ones not having been regarded.

I believe mine were set at the same distances as the old, that is, about two rods apart, except where circumstances required a closer set.

After I commenced, I sometimes surveyed half a mile a day; sometimes less.

Fred. Baker was in my company as rodman.

I commenced at Long Cañon and surveyed up until I reached the river.

I can't recollect the exact date when I quit. I did not progress so fast at the upper end as at the lower; perhaps something more than a quarter of a mile a day along the upper end.

In testifying to-day I rely entirely upon my memory as to
666 dates, &c., not having seen a paper since I left Placerville.

I don't remember that Mr. Gordon ever asked me to set a grade along that line. Mr. Kinyon did several times, and whenever he did he got them. Kinyon never asked me for grades ahead of my own work on the line.

I suppose I was in the employ of the co. Mr. Binney employed me in San Francisco. I had a settlement with the company.

It was my duty, as engineer, to see that the surveying along the line was done as rapidly as desired by Gordon and Kinyon.

Direct resumed:

Fred'k Baker was with me from the time I went up until I completed the upper line, and never acted in any other capacity than rodman.

Question. Was Fred'k Baker an engineer?

667 (Objected to as not being in rebuttal of anything inquired of on cross-examination.)

Ans. He was not, according to the best of my knowledge.

No complaint was made to me at any time by Gordon or Kinyon

that they wanted grade pegs; and all demands on me made by them were always complied with.

(Objected to as matter not brought out on cross-examination.)

At the time I left for Placerville, about the middle of June, no work was being done upon the line.

I had done my work up the line above Gordon and Kinyon's camps before they were ready to do any work. They were working behind me all the time.

668 The most convenient and profitable points for the contractors to work at would be at those nearest their camp.

(Objected to as new matter.)

On this work the surveying, to have been accurate, must have been commenced at the lower end and worked up; otherwise the grade might have been wrong.

If required at any time to fix grade pegs above any point where I was working, I would have had to survey from that point, and chain up to the place desired to set the pegs. The difference of time in setting these pegs as I went along, and chaining up, would not have been greater than an hour and a half or two hours to the half mile.

(Objected to as new matter.)

Cross-exam. resumed:

669 I don't know whether or not the contractors made any complaints to the chief engineers, or to the directors, about the want of grade pegs. I don't know of my own knowledge how many men Gordon had up there. It was a large number.

GEO. R. TURNER.

Sworn to and subscribed before me this 5th day of October, A. D. 1860.

JNO. B. WILLIAMS, *U. S. Com'r.*

Indorsed: Filed Oct. 12, 1860.

670 *Notice.*

In the circuit court of the United States for the districts of California, in and for the northern district, in equity.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL COMP'Y *et al.*

You will please to take notice that on Thursday, the 4th day of October, 1860, at 11 o'clock a. m. of that day, at the office of John B. Williams, esq., in the city of San Francisco, we shall proceed to take the deposition of A. J. Binney, to be read in evidence on behalf

of the defendants on the trial of the above-entitled cause, and shall continue from day to day until said deposition is completed.

San Francisco, 26th Sept., 1860.

CROCKETT & CRITTENDEN,
Att'ys for Def'ts.

To Mess. McDougall & Sharp,
Att'ys for Compl't.

Copy rec'd Sept. 26th, 1860.

McDOUGALL & SHARP, *Sol'r for Pl't.*

671 *Deposition A. J. Binney.*

In the circuit court of the United States for the districts of California, in and for the northern district, in equity.

George Gordon
vs.
The South Fork Canal Company *et al.*

Be it remembered, that on this 4th day of October, A. D. 1860, at San Francisco, in the district aforesaid, before me, John B. Williams, a commisssioner duly appointed by the circuit court of the United States for the districts of California, to take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil causes depending in the courts of the United States, pursuant to the acts of Congress in that behalf, personally appeared A. J. Binney, a witness produced in behalf of the defendants in the above-entitled cause, in pursuance of the subpœna duly served on him, hereto annexed, and in pursuance of notice duly served on the solicitors for com-
672 plainant herein, also annexed hereto, who, being duly sworn, testified as follows.

Present: Messrs. Crockett and Crittenden, by Mr. Williams, for defendants; and Messrs. McDougall and Sharp, by Mr. Hume, for compl't.

Questions in behalf of defendants:

Question 1. State your name, age, residence, and occupation.

Ans. Andrew J. Binney; age, about 34; residence, San Francisco; civil engineer by profession, and railroad contractor my present occupation.

Questions in behalf of compl't:

Ques. 2. Are you not named as one of the defendants in this suit?

673 Ans. I have never been served with any process, but yesterday saw my name as one of the defendants in the papers in the case.

3d. Were you a stockholder in the South Fork canal? and if so, for what length of time?

Ans. I was; I think, from its commencement until after the letting of the contract to Mr. Gordon, and after he had ceased to work upon it.

4th. Were you a director of the company when the contract was made with Gordon, and when he was at work there?

Ans. I was not, at that time.

(The complainant's solicitors object to the testimony of the witness upon the ground of interest, and because he is a party to the cause.)

Questions resumed by sol'r for defend'ts:

674 5th. Are you acquainted with Geo. Gordon and Alonzo Kinyon?

Ans. I am. I was cognizant of the fact that those gentlemen entered into a contract with the South Fork Canal Co., the defendants, for the completion of the South Fork canal from Long Cañon to the American river. I was at that time in the employ of the company as chief engineer of the works, and acted as such until after Gordon and Kinyon abandoned their contract.

I had entire charge of the works. All matters connected with the contract, about which there might be any controversy, were referred to my arbitration.

(Objection is made to any testimony concerning the contract, as that instrument speaks for itself.)

It was part of my duty to fix the levels, set the pegs, &c.; to furnish the grades and other matters connected with the work.

675 As engineer, I personally, or through my assistants, furnished Mr. Gordon with the levels and grades, and run the lines.

The grade pegs of the entire line to the American river were set before work was let. These pegs were set 33 feet from each other; I think either 33 or 66 feet apart. My impression is 33.

After the grade was dug into the hill it became necessary to set more pegs at reasonable distances from each other, on both sides, in order that the flume might be laid with sufficient accuracy. These were set as fast as the digging would allow.

The contractors were at no time, so far as I knew, put to any inconvenience or delay for the want of grades during the progress of the work.

The company at all times kept a sufficient force at work for all purposes of engineering or superintending.

676 I recollect that once or twice Mr. Gordon made demands for additional levels, but I never could understand why, for I was there all the time. There was not the slightest necessity for it.

I remember that Gordon and Kinyon abandoned the contract, and that about that time I was informed they had given the company written notice of it.

(Last portion of the answer objected to, which testifies on information.)

I do not remember of any further work having been done after that time.

The engineer's estimate, made by me, will show the amount of work done, its condition, materials on hand, &c., at that time. This

estimate was particularly and carefully made at the time, and was intended to be just to Mr. Gordon, but not liberal.

This estimate was made in duplicate, and one copy was delivered to Mr. Gordon and the other to the company, which latter should have theirs on file in the archives of the company.

677 All the estimates I ever made with respect to this company were made in writing.

I remember that there was a settlement between the company and Kinyon, and that the latter gave the former a release. I have never *have* seen the release. I was at Placerville at the time the negotiations which led to this release were going on between the company and Kinyon. I was then engineer of the company, but not a director. I took no part in the negotiations.

I had no knowledge of any attempt or intention on the part of Kinyon to commit a fraud upon Gordon or upon any one else in that transaction, or of any member of the board of trustees of the company having such knowledge.

(Object. to as irrevelant.)

I know Kinyon left the town of Placerville after making the release. I think it was two or three days afterwards. We left together, and in company with others for Sacramento. I did not know at that time that Kinyon intended to leave the State, or that any

678 member of the board had such knowledge. I would here state that, from the character and terms of the settlement, I suspected that Kinyon had wrong intentions. I had no earthly reason for thinking so except from the character of that settlement, although he released Gordon from a bond for some $50,000. I formed this opinion or suspicion at the time the bargain was made, and was certain when Kinyon left on the steamer. This suspicion or impression was based upon the fact that, without having seen the contract, I supposed Kinyon had conveyed to the company certain saw-mills and other property which belonged to Gordon, and which were not forfeited by reason of the non-performance under the contract. There was no other circumstance which occurred to excite that suspicion. I looked upon this as being Gordon's private property, and that Kinyon

679 had no right to interfere with it.

On the other hand, I thought the company acted foolishly, as Gordon and Kinyon had forfeited their contract and their bond of $50,000.

(Objected to as irrelevant, and as matter of opinion.)

My leaving Placerville for Sacramento in company with Kinyon was the result of accident. We travelled together no further than Sacramento. I came through to San Francisco same day, leaving Kinyon in Sacramento. I have never seen him since. I did not go to the steamer on which he left, nor did I seek him in any way. I am not sure how I found out that he had gone on the steamer, but think I learned through Mr. Kirk after the steamer had sailed. As soon as I heard that Kinyon had left, I made it my business to see Gordon, and informed him.

680 The firm name was "George Gordon and Kinyon," and business was transacted under that style. Kinyon seemed to act the same as any partner would act.

(Last part of answer objected to on the ground that it is a statement of a conclusion and of an opinion, and not a statement of fact.)

Mr. Kinyon had the management and control of the business, and my transactions with him were on the basis that he was a full partner of Gordon's. He acted as any partner would act.

Cross-examination:

The grade pegs were set before the contract was made; these pegs, I think, were 33 feet apart, perhaps 66, and were set in one line to show where the digging was to commence along the slide of the hill. I am not sure they were set before the advertisement was made for proposals; I think some of them only, but they were all set before the contract was made. These pegs were set just before the

681 contract was made.

I superintended the setting of a portion of these pegs myself, and the rest were set by my assistants.

It was necessary to set new pegs over the entire line before the flume was laid, so that the grade should be regular. This was done as fast as excavated.

There was surveying done along the line after Gordon commenced work, which consisted in setting these second series of pegs. There was always an engineer on the road at not over a day's interval, either myself or one of my assistants, and whatever Mr. Gordon wished done was always attended to there and then.

There never was any cause for Mr. Gordon to demand from me the setting of any pegs. I never could understand why he asked for any. At the receipt of one of Mr. Gordon's notes which asked for

682 pegs, which was handed to me at Placerville, I immediately went on the work, but failed to discover that he was in want of anything.

Mr. F. Baker was rodman on the work, and may have helped set the first line of grade pegs. I don't recollect whether Mr. Turner assisted or not, nor do I recollect whether Mr. Baker was at the upper or lower end of the work.

I don't recollect that Kinyon ever demanded any grade pegs from me. I don't recollect that he complained for want of pegs.

I suspected that Gordon was seeking a pretext to break with the company, and hence made these demands for grade pegs, and I was very particular to give him no cause in that way.

(Objected to by complainant's solicitor as a statement volunteered by the witness.)

I never saw Gordon's notification to the company that he abandoned the work, and don't know except from hearsay that he

683 notified the company in writing.

I have no recollection of the exact time when Gordon absolutely quit work. I think after he quit that I became director. I am not sure, but think it was afterwards. I was not director nor engineer when the contract was made with Kirk. I don't know of any work

having been done on the line of the canal after Gordon left, until Kirk took it to complete.

I don't recollect when my estimate was filed. I mean the last one made under Gordon's contract. It was made within the time specified in the contract. I don't recollect its amount. I estimated everything, but cannot state the amount of any item. I estimated all material intended for the work, and everything in and on it. My impression is that Kinyon was with me.

684 I am certain that all the work done, that I could find, was estimated, and I searched thoroughly. I cannot state what amount was for timber. There might have been some pieces of timber in the woods not included, but think it scarcely possible. Kinyon was with me, I think. I don't remember the valuation placed by me upon any item in that estimate. I measured all the timber and lumber estimated. I measured all that was hewed, and tried to do him exact justice, measured the work honestly, though not liberally. I put the estimate low on purpose to give him opportunity to quit the contract with more money than was due him, but less, if either way, and trying to be exact and precise, and not on account of the financial condition of the company. My estimate was low, but not unjust, and all he had a right to demand under the contract.

685 I think, but don't know, that the company at the time was embarrassed for money. At the time I made these estimates I was a stockholder in the company.

There was a good deal of work done for Mr. Gordon preparatory to the work on the canal, such as constructing saw-mills; he built two, making slides down the bank for the running down of the sawed timber from the mills, making roads, &c. These things did not enter into my estimate. This work was judicious and to some extent necessary.

(Objected to so far as the testimony goes to the question of lien as irrelevant.)

Taking all the circumstances together such as enumerated above, I cannot say whether or not his expenditures were half completed, but should think not. He had done but little work on the canal itself. I don't remember the amount of the estimate, which amount,

686 less the percentage provided for in the contract, was tendered to him, as I understood.

I had no hand in making the contract with Kinyon that led to the release. Never saw the paper. I don't know when it was executed. I was not present, but was in town at the time, and happened into the director's office while they were talking over it.

When I came down to Sacramento with Kinyon I did not know he was on his way to the States. He said nothing to me about it.

I have no knowledge of Kinyon's financial condition when he went in with Gordon. I did not esteem him as possessing any considerable means, but saw he had the energy to make means.

Kinyon had charge of everything, he was the working man, and superintended everything, hired men and discharged them. He was

upon the work and attended to the building of the work. I
687 had no intercourse with either Gordon or Kinyon, except as connected with the building of the canal. I don't recollect of his ever having written to the company. In bargaining, his business was with me, and I talked with him as with a man who was conducting the business of the prosecution of the contract with Gordon and Kinyon.

4th. On which of those contractors, Gordon or Kinyon, did the company rely for the means to finish the contract made with them?

(Objected to by solicitor for defendants as irrelevant and immaterial, and as calling for proof by parol which should appear in the written contract between the parties.)

Ans. They looked to Gordon and Kinyon. I considered Gordon as a man of large means, and Kinyon as a man of no very considerable means. What their (Gordon's and Kinyon's) relations were
688 I don't know, nor do I think the company did. I suppose the opinion of the company was the same as mine, but I don't know.

Direct resumed:

Fred'k Baker acted in no other capacity than as rodman, and was not an engineer by profession, to my knowledge. I never suspected he was one.

I would not myself, nor do I think any one else would, make a contract for constructing a canal before seeing the line laid out and shown by these grade pegs.

(Objected to as a matter of opinion.)

Prior to my employment by the company, I had been an engineer ever since I left school. I was educated for one. I had then
689 frequently participated in the letting of such contracts, and was familiar with such works, and since then, I have taken contracts for similar works.

Examination closed.

ANDREW J. BINNEY.

Sworn to and subscribed before me this 4th day of October, A. D. 1860.

JNO. B. WILLIAMS, *U. S. Com'r.*

Indorsed: Filed Oct. 12, 1860.

690 *Notice of lien.*

The South Fork Canal Comp'y, Dr., to Geo. Gordon and Kinyon:

1853.—March 15 to June 13. To grubbing tract of land	$2,400 00
To grading earth-work, hardpan, rock excavation	12,500 00
To lumber, 300 M feet, at 75	22,500 00
To 10 x 10 timber, 63,000 feet, a 20 c	12,600 00
To small timber, 66,000 feet, a 8 c	5,280 00
To work on trestle foundation, rolling rocks, 300 days, a $6	1,800 00
To erection of trestles and laying sills	1,000 00

To erection of mills for the purposes of the canal.....	$27,000 00
To making roads, railroads, inclined planes, workmen's houses, and providing tools, machinery, blacksmiths' shops, and offices for the work.....	17,438 00
To camp equipments for men, for legal expenses maintaining claim to timber land for canal use, and for travelling expenses of contractors..	3,900 00
	106,418 00

691 Notice is hereby given that we intend to hold a lien on the works known as the South Fork canal, situate near Placerville, in Eldorado county, for one hundred and six thousand four hundred and eighteen dollars, being the amount due to the undersigned for work, labor performed, and materials furnished and supplied to them for the use of the said South Fork Canal Company.

San Francisco, June 20, 1853.

GEO. GORDON & KINYON.

Indorsed: Filed June 21st, 1853, at 4⅛ o'clock p. m.—Recorded in book "Mechanics' Lien Record," on pages 221 and 222, June 21st, 1853, at 5 o'clock p. m.

GEO. W. INGHAM,
Recorder of Eldorado County,
By JAMES DAVANT, *Deputy.*

692 *Notice by George Gordon.*

Know all men by these presents that the notice of lien heretofore filed in the recorder's office in Eldorado county, made by Gordon and Kinyon upon the South Fork canal, and recorded on the twenty-first day of June, 1853, in book D "Mechanics' Lien Record," page two hundred and twenty-one, is yet binding and in force, and that any release or other discharge of the same made by Alonzo Kinyon or by his authority is fraudulent, inoperative, and void.

Witness my hand this 6th day of July, A. D. 1853.

GEO. GORDON.

Indorsed: Filed per record, July 7, A. D. 1853, at 11 o'clock a. m.—Recorded in book Mechanics' Lien Record on page 239, July 7, 1853, at 12 o'clock m.

GEO. H. INGHAM,
Recorder of Eldorado Co.,
By JAMES DAVANT, *Deputy.*

693 *Deed.—David E. Buel to Thomas H. Williams*

South Fork Ca'l Co., defendants.

This deed of bargain and sale and conveyance, made this 9th day of November, A. D. 1854, between David E. Buel, sheriff of Eldorado county, State of California, and Thos. H. Williams, of said county and State, witnesseth: That whereas, by virtue of a certain execution

issued out of and under the seal of the clerk's office of the district court for the 4th judicial district, city of San Francisco, State aforesaid, tested the 25th day of November, A. D. 1853, at the suit of Benjamin T. Moulton, plaintiff, against South Fork Canal Company, corporation, defendants, directed and delivered to said sheriff, commanding him to make of the goods and chattels of said South Fork Canal Company, in said county, the sum of eighteen thousand five hundred and thirty-seven $\frac{50}{100}$ dollars debt, with interest at
694 the rate of three per cent. per month from the 25th day of November, A. D. 1853, together with the sum of two hundred and sixteen $\frac{50}{100}$ dollars costs before judgment, and the further sum of nine hundred and thirty-nine $\frac{40}{100}$ dollars, being costs of sale, which Benjamin F. Moulton had recovered against said South Fork Canal Company; and if sufficient goods and chattels could not be found, then to cause the aforesaid sum to be made of the real estate of said South Fork Canal Company which it had on the 25th day of November, 1853; also by virtue of an order of sale issued out of the clerk's office of the district court for said county of Eldorado in favor of Reynolds & Son, and against said South Fork Canal Company, tested the 22d day of February, A. D. 1854, for the sum of thirteen thousand three hundred and eighty-seven $\frac{50}{100}$ dollars, with interest on two thousand dollars at the rate of four and a half per cent. per
695 month, and on the sum of three thousand three hundred and eighty-seven $\frac{50}{100}$ dollars at the rate of three per cent. per month from the docketing of said judgment, together with the sum of one thousand one hundred eleven $\frac{50}{100}$ dollars interest before judgment, with one hundred and twenty-one dollars costs, and costs of sale amounting to seven hundred and eight $\frac{50}{100}$ dollars, which the said Reynolds & Son had recovered against the said South Fork Canal Company in the said court on the 12th day of September, A. D. 1853, commanding him to sell at public sale the following described property, to wit: a flume four feet wide, and three feet deep, and about sixteen miles long, extending from Long Cañon in said county to the large reservoir above Placerville; also a ditch and flume extending from said reservoir to Coon Hollow ridge known as the Coon Hollow branch; also the three distributing ditches; also the large re-
696 servior above described, and the small reservoir on Coon Hollow ridge, and all the other works belonging thereto known as the South Fork Canal Company's works. The said sheriff did levy on and seize all the estate, right, title, and interest of the said South Fork Canal Company in and to the premises hereinbefore described, and after due notice, according to law, at public vendue, before the court-house door in said county, on the 8th day of May, A. D. 1854, did expose the said described property for sale, at which sale the said premises were struck off to Thomas H. Williams for the sum of forty-one thousand one hundred and ninety-four $\frac{83}{100}$ dollars, he being the highest and best bidder, and that being the highest sum bid for the same. And whereas six months have expired since said day of sale, and said premises remain unredeemed by the judgment debtors,

or any other redemptioner entitled to make redemption. within
697 that time: Now this indenture witnesseth that the said David E. Buel, sheriff of said county, by virtue of the said writs and in pursuance of the act in such cases made and provided, and in consideration of the sums so bid as aforesaid to him duly paid, hath sold and by these presents doth grant and convey, unto the said Thomas H. Williams all of the estate, right, title, and interest which the said defendant had at the time of the levy of the attachment upon which said order of sale was obtained and issued, and at any time afterwards, in and to the above-described premises.

To have and to hold unto the said Thomas H. Williams, his heirs and assigns forever, as fully and absolutely as the said party of the first part, as sheriff aforesaid, can or ought to by virtue of the said writs and the law relating thereto.

698 In witness whereof, the said sheriff has signed his name and affixed his seal the day and year above written.

DAVID E. BUEL, [SEAL.]
Sheriff of Eldorado County, Cal'a.

STATE OF CALIFORNIA, *Eldorado county, ss:*

On this ninth day of November, A. D. 1854, before the undersigned recorder in and for the county aforesaid, came David E. Buel, known to me to be the individual described in and who executed the within deed of conveyance, and to me acknowledged the execution thereof as his free and voluntary act for the uses and purposes therein mentioned.

GEO. H. INGHAM,
Recorder for Eldorado Co.,
By JAMES DAVANT, *Deputy.*

Indorsed: Filed Nov. 9th, 1854, at 4 $\frac{30}{60}$ o'clock p. m.
GEO. H. INGHAM,
Recorder for Eldorado Co.,
By JAMES DAVANT, *Deputy.*

699 STATE OF CALIFORNIA, *County of Eldorado:*

I, George Duden, county recorder for said county and State, certify that I have compared the foregoing copy of a deed with the original record of the same remaining in this office, and that the same is a correct transcript therefrom.

In witness whereof, I have herewith set my hand and official seal this 27th day of May, A. D. 1861.

[SEAL.]

GEO. DUDEN,
Recorder for Eldorado Co.,
By E. B. CARSON, *Deputy.*

Indorsed: Filed July 15, 1862.

HENRY C. HYDE, *Clerk.*

700 *Complaint.*

District court, 4 judicial district.

BENJAMIN F. MOULTON
vs.
THE SOUTH FORK CANAL COMPANY.

STATE OF CALIFORNIA, *San Francisco county, ss:*

Benjamin F. Moulton, the plaintiff in this action, complains of the South Fork Canal Company, defendant, a corporation organized and established under the law of the State of California, for this: That the said plaintiff was, during and after the month of May last past, duly authorized by the said defendants to act as the lawful agent of the said defendants in the city of San Francisco, in said county, in collecting, raising, and disbursing money for and in behalf of the said defendants and in and about their business. That the said plaintiff accepted such agency and entered upon the performance of
701 its duties some time in the month of May last past, and so continued up to about the first day of August, A. D. 1853. That during said period the said plaintiff collected, received, loaned, transmitted, and disbursed various sums of money for and to the said defendants and under the direction and for the use and at the request of said defendants. That on or about the 28th day of July last past the said plaintiff furnished and transmitted to the said defendants an account current containing a statement of the collections, receipts, loans, and disbursements, *receipts, loans, and disbursements* aforesaid, which was received and admitted by defendants, showing a balance of seventeen thousand one hundred and eighty-two dollars and eighty-seven cents due and owing from the said defendants to the said plaintiff, a true copy of which account (marked M) is annexed to and made a part
702 of this complaint. That the said defendants are justly indebted and are liable to pay the said plaintiff the said balance of $17,182 $\frac{87}{100}$, together with the sum of $941 26 for commissions upon the business aforesaid, and the further sum of $840 lawful interest upon the said sums of money lent and advanced by the said plaintiff to the said defendants, making in the aggregate the sum of eighteen thousand eight hundred and sixty-four and $\frac{23}{100}$ dollars, and being so liable and indebted, the said defendants agreed and promised to pay the said plaintiff the said last-mentioned sum of money when the said defendant should be thereunto afterwards requested.

And for this also, that the said defendants afterwards, to wit, on the 28th day of July, A. D. 1853, were indebted to the said plaintiff in the further sum of eighteen thousand eight hundred and sixty-four and $\frac{23}{100}$ dollars for so much money before that time by the said
703 plaintiff lent and advanced, paid, laid out, and expended to and for the use of the said defendants and at their special instance and request, and being so indebted and in consideration thereof the said defendants afterwards, to wit, on the same day and year last aforesaid, and at the said county of San Francisco, then and there undertook and promised to pay the said plaintiff the said sum of

money last above-mentioned, when they the said defendants should be thereunto afterwards requested.

And for this also, that the said defendants afterwards, to wit, on the said 28th day of July, A. D. 1853, at the county aforesaid, were justly indebted to the said plaintiff in the further sum of three thousand five hundred dollars for work, labor, and services done and performed for and at the request of the said defendants by him the said plaintiff, and also for a certain commission and reward due
704 and of right payable to the said plaintiff for the same; and the said defendants, being so indebted and in consideration thereof, afterwards, and on the same day and year last aforesaid, and the place aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him, the said plaintiff, the said sum of money last above-mentioned, when the said defendants should be thereunto afterwards requested.

And for this also, that the said defendant afterwards, to wit, on the 28th day of July, A. D. 1853, at the place aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time and then due and owing from the said defendants to the said plaintiff, and upon such accounting the said defendants were found in arrears and indebted a further balance, to wit, the further sum of eighteen thousand eight hundred sixty-four
705 and $\frac{2}{100}$ dollars, to the said plaintiff, and the said defendants, being so found in arrear and indebted, and in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook and then and there faithfully promise the said plaintiff to pay him, the said plaintiff, the said sum of money last above mentioned, when the said defendants shall be thereunto afterwards requested.

Nevertheless, the said plaintiff says the said defendants, although often requested, hath not paid the said several sums of money, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same or any part thereof the said defendants have hitherto wholly failed and refused, and doth still refuse.

Wherefore the said plaintiff prays judgment against the said
706 defendants for the said sum of eighteen thousand eight hundred sixty-four and $\frac{2}{100}$ dollars, with interest thereon until paid, together with costs and general relief.

CROCKETT and PAGE and SHARP,
Att'ys for Plaintiff.

STATE OF CALIFORNIA, *San Francisco county, ss:*

Benjamin F. Moulton, being duly sworn, says on oath that he is the plaintiff in this suit; that he has heard the foregoing complaint read, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on his information and belief, and as to such matters he believes it to be true.

BENJ. F. MOULTON.

Sworn and subscribed to before me this 8th day of August, 1853.

R. C. HOPKINS, *D. Clerk*

707 Account with Benj. F. Moulton, Cr.

1853.			
May 27.	By cash rec'd from F. Buel, 15 per cent. on 10 shares	$150	
27.	By cash rec'd from E. Deusenberg, 20	300	
27.	By cash rec'd from H. F. Cutler, 2	30	
27.	By cash rec'd from A. Generi, 19½	293	50
27.	By cash rec'd from J. S. Harper, 5	75	
27.	By cash rec'd from E. W. Church, 8½	127	50
27.	By cash rec'd from B. F. Moulton, 20	300	
30.	By cash rec'd from G. W. Douglass, 7½	112	50
June 1.	By cash rec'd from E. D. Judah, 5	75	
2.	By cash rec'd from J. B. Thomas, 5	75	
2.	By cash rec'd from J. W. Gager, 25	375	
3.	By cash rec'd from N. K. Master, 7½	112	50
4.	By cash rec'd from W. P. Louchow, 10	150	
4.	By cash rec'd from Bridget Manly, 5	75	
4.	By cash rec'd from J. S. Hutchinson, 15	225	
10.	By cash rec'd from F. Williams, 15	225	
14.	By cash rec'd from J. H. Easton, 30 per cent., 2½, 1st and 2d int	75	
14.	By cash rec'd from A. B. Easton, 5, 1st and 2d int	150	
16.	By cash rec'd from H. F. Cutler & Co., 15 per cent., 2, 2d int	30	
28.	By cash rec'd from M. A. Richter, 30 per cent., 2, 1st and 2d int	30	
30.	By cash rec'd from one bond	300	
30.	By cash rec'd from draft of South Fork Canal Co.	600	
July 23.	By cash rec'd from John C. Butler, 15 per cent. on 10 shares	150	
	Balance carried down	17,182	87
		21,218	87

Bonds received		$75,000
Sold to Kirk	54,300	
Sold to Kirk	300	
Sent Dr. Keene as sample	300	
Security for cash loan	20,100	
		75,000

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1853.	Dr., South Folk Canal Co.	
May 24.	To cash paid Times and Transcript	$8
28.	To cash paid Britton & Rey	200
28.	To cash paid San Francisco Whig	3
28.	To cash paid draft in favor J. H.	1,500
31.	To cash paid draft in favor J. H. Gager	50

June 1.	To cash paid Times and Transcript	$3	
3.	To cash paid Britton & Rey	20	
4.	To cash paid Wells, Fargo & Co	455	45
7.	To cash paid Wells, Fargo & Co	16,000	
7.	To cash paid commissions on loan, 5 per cent	800	
27.	To cash paid Evening Journal	8	
28.	To cash paid Times and Transcript	8	
28.	To cash paid San Fran'o Herald	3	
July 2.	To cash paid half-commissions on bonds sold	1,357	50
7.	To cash paid Alto California	23	
7.	To cash paid Drexel, Luther & Church, coupons	54	
9.	To cash paid Britton & Rey for bonds	40	
9.	To cash paid interest on loan of $16,000, 3 per cent	480	
23.	To commissions on assessments collected	173	92
23.	To cash paid for coupons due July 1st	18	
27.	To cash paid San Francisco Herald	12	
		21,218	87
July 28.	To balance brought down	17,182	87

San Franscisco, July.

709 Indorsed: Complaint filed Aug. 8, 1853.

R. C. HOPKIN, *D. Cl'k.*

Default entered Aug. 19, 1853.

R. C. HOPKINS, *D. Clerk.*

Summons.

In the district court of the fourth judicial district of said State.

THE STATE OF CALIFORNIA, *County of San Francisco:*

The people of the State of California to Jas. De Ro, president of the South Fork Canal Company, greeting:

You are hereby summoned to appear and answer in said court unto the complaint of Benjamin F. Moulton, in an action to recover $18,864 23 money loaned and advanced and services rendered you, for which you have failed to pay, filed in our said court within ten days after the service of this writ, if served in said county, and within forty days if served in any other county, or judgment by default will be taken against you for $18,864 23, with interest and

710 costs of suit.

Witness Hon. Delos Lake, judge of the fourth judicial district of said State, this 8th day of August, A. D. 1853.

JAMES E. WAINWRIGHT, *Clerk,* [SEAL.]

By R. C. HOPKINS, *Dep. Clerk.*

Indorsed: Received the within summons August 8, 1853, at 4½ p. m.; personally served on the def'ts by delivering to De Ro, in the

city of San Francisco, a copy of this summons, attached to a certified copy of the complaint.

F. P. JOHNSON, *Sheriff*,
By W. H. McMINN, *Dep'y.*

711 *Answer.*

District court, fourth district.

MOULTON
vs.
SOUTH FORK CANAL CO.

The defendant admits that the plaintiff has been the agent of the defendant, but he denies that the defendant is indebted to him in the sum claimed, and calls for strict proof thereof. This defendant admits that there is some indebtedness on its part to the plaintiff, but is unable to say how much, and therefore calls for full proof of the plaintiff's claim.

SANDERS & HEPBURN, *for Def't.*

STATE OF CALIFORNIA, *County of San Francisco, ss:*

Personally appeared Charles De Ro, who made oath that he is the president of the South Fork Canal Company, the defendant in this cause, and that the facts set forth in the above answer are true.

CHARLES DE RO,
Pres'd't S. F. Canal Co.

712 Sworn to and subscribed before me this 25 day of August, 1853.

JAMES E. WAINWRIGHT, *Co. Clerk*,
By GEORGE T. HUNT, *Deputy.*

Indorsed: The clerk will strike out the default in this case, and allow the anwer to be filed.

CROCKETT & PAGE, *Att'ys for Pl'ff.*

Filed Aug. 27, '53.

R. C. HOPKINS, *D. Clerk.*

713 *Stipulation for judgment.*

District court, 4 jud. dist.

B. F. MOULTON
vs.
THE SOUTH FORK CANAL COMPANY.

It is agreed between the parties in this suit that judgment may be entered therein, as of this date, for the sum of eighteen thousand five hundred and thirty-seven $\frac{45}{100}$ dollars, ($18,537 45,) with interest at the rate of three per cent. a month, against defendants and in favor of plaintiffs, with costs to be taxed, except commissions.

Nov. 25, 1853.

SAUNDERS & HEPBURN, *for Def't.*
SOL. A. SHARP, *Att'ey for Plaintiff.*

Indorsed: Filed Nov. 25, 1853.

R. C. HOPKINS, *D. Clerk.*

714 *Judgment.*

District court, fourth judicial district, State of California.

BENJAMIN F. MOULTON
vs.
THE SOUTH FORK COMPANY.

On this day come the parties to this suit, by their respective attorneys, and file in court their stipulation, whereby it is stipulated by and between the parties aforesaid that judgment be entered against the said defendant, the South Fork Canal Company, and in favor of the said plaintiff, Benjamin F. Moulton, for the sum of $18,837 45, (eighteen thousand five hundred and thirty-seven 45-100 dollars,) with interest thereon at 3 per cent. per month, and costs.

Therefore, by reason of the law and the premises, it is ordered and adjudged that the said plaintiff, Benjamin F. Moulton, do have and recover of the said defendant, the South Fork Canal Company, the said sum of eighteen thousand five hundred and thirty-seven
715 dollars and forty-five cents, with interest as aforesaid, and costs of suit taxed at $216 50.

Entered Nov. 25th, 1853.

Indorsed: Judgment roll.—Filed Nov. 25, 1853.

R. C. HOPKINS, *D. Clerk.*

Execution.

STATE OF CALIFORNIA, *County of San Francisco, ss:*

The United States of America, the people of the State of California to the sheriff of Eldorado county, greeting:

(Judgment, 18,537 45; interest, ; attorney's fees, ; clerk's fees, 216 50.)

Whereas a judgment was rendered in the district court of the fourth judicial district, at the court-house of said court in the city of San Francisco, on the 25th day of November, A. D. 1853, against the South Fork Canal Company in favor of Benjamin F. Moulton
716 for the sum of eighteen thousand five hundred and thirty-seven $\frac{45}{100}$ dollars, with 3 per cent. per month interest thereon until paid, and also for two hundred and sixteen $\frac{50}{100}$ dollars costs of suit docketed in said county on the 25th day of Nov., A. D. 1853—

These are therefore to command you that out of the goods and chattels, if sufficient, if not, then out of the lands and tenements of the said South Fork Canal Company, you levy and cause to be made by distress and sale the said sum of eighteen thousand five hundred and thirty seven $\frac{45}{100}$ dollars, with interest as aforesaid, judgment and the said sum of costs, also together with all costs that may accrue; and of this writ make legal service and return on the sixtieth day after your receipt thereof.

Witness Hon. Delos Lake, judge of the fourth judicial district of said State, this 25 day of November, A. D. 1853.

Attest: THOS. HAYES, *Clerk*,
[SEAL.] By R. C. HOPKINS, *Dep. Clerk.*

Indorsed: Rec'd Nov. 26, 1853, at 7 o'c. p. m.
E. N. STROUT, *Under Sheriff.*

717 STATE OF CALIFORNIA, *County of Eldorado*:

Levied the within execution upon the following described property lying and being in Eldorado county, to wit, a flume four feet wide and three feet deep, about 16 miles long, (more or less,) extending from Long Cañon to the large reservoir above Placerville; also a ditch and flume extending from the large reservoir to Coon Hollow ridge; also three distributing ditches; also the large reservoir before mentioned and the small reservoir on Coon Hollow ridge, and all the other works belonging thereto known as the South Fork Canal Company's canal, this 28th day of November, A. D. 1853.

D. E. BUEL, *Sheriff*,
By E. M. STROUT, *Under Sheriff.*

I hereby return this execution satisfied in part by the sale of the above-described property, after due notice according to law, at public
718 auction, to Thos. H. Williams, he being the highest bidder, for the sum of $41,194 83, of which $19,712 67 was applied to the payment of an order of sale issued from the clerk's office of the 11th judicial district court for Eldorado county, the within being satisfied to the amount of $21,482 31.

D. E. BUEL,
Sheriff of Eldorado County.
By E. M. STOUT, *Under Sheriff.*

This 8th day of May, A. D. 1854.

Judgment	18,537 45
Costs	216 50
Int. ex. sat.	
Interest	3,058 66
Sheriff's costs	961 36
	22,773 97
	21,482 16
Due	1,291 81

May the 8th, A. D. 1854.

Received of Sheriff D. E. Buel on the within execution the sum of twenty-one thousand four hundred aad eighty-two dollars and sixteen cents.

REED, KIRK & LISLE,
By NEWELL & WILLIAMS,
their Att'ys.

719 STATE OF CALIFORNIA, *County of San Francisco, sct:*

The United States of America, the people of the State of California to the sheriff of county of Eldorado, greeting:

Judgment, $18,537 45; interest, 3 per c't p'r month from Nov. 25, 1853; attorney's fees, clerk's fees, 216 50.

Whereas judgment was rendered in the district court of the fourth judicial district, at the court-house of said court in the city of San Francisco, on the 25 day of November, A. D. 1853, against the South Fork Canal Company in favor of Benjamin F. Moulton for the sum of eighteen thousand five hundred and thirty-seven $\frac{45}{100}$ dollars, with 3 per cent. per month interest thereon until paid, and also for two hundred sixteen $\frac{50}{100}$ dollars costs of suit docketed in said county on the 25th day of November, A. D. 1853—

720 These are therefore to command you that of the goods and chattels, if sufficient, if not, then out of the lands and tenements of the said South Fork Canal Company, you levy and cause to be made by distress and sales the said sum of $18,537 45 *dollars*, with interest as aforesaid, judgment and the said sum of costs, also together with all costs that may accrue; and of this writ make legal service and return on the sixtieth day after your receipt hereof.

Witness Hon. Delos Lake, judge of the fourth judicial district of said State, shis seventh day of March, A. D. 1854.

Attest: THOMAS HAYES, *Clerk*,
[SEAL.] By OTMAR CALER, *Dep. Clerk.*

Indorsed: Received May 22, at 10 o'c. a. m.
D. E. BUEL, *Sh'ff*,
By E. N. STROUT, *Und. Sh'ff.*

STATE OF CALIFORNIA, *County of Eldorado:*

I hereby return this execution unsatisfied, there being no property found whereby it could be satisfied, or any part thereof in my county, this 19th day of June, A. D. 1854.

721 D. E. BUEL,
Sheriff of Eldorado Co.,
By E. N. STROUT, *Under Sheriff.*

In the district court of the 4th judicial district of the State of California, in and for the city and county of San Francisco.

BENJAMIN F. MOULTON
vs.
THE SOUTH FORK CANAL COMPANY.

I, Washington Bartlett, county clerk of said city and county and ex-officio clerk of said district court, do hereby certify that the foregoing are full, true, and correct copies of various original papers constituting the judgment roll in the above-entitled cause, and of the execution issued therein, with the returns of the sheriff indorsed thereon, now remaining on file in my office.

Attest, my hand and seal of said district court this 14th day of July, A. D. 1862.

[SEAL.] WASHINGTON BARTLETT, *Clerk*,
By JNO. HANNA, *D. C.*

Indorsed: Filed July 15, 1862.

HENRY C. HYDE, *Clerk.*

722 *Complaint.*

In the district court of the eleventh judicial district, Eldorado county, State of California.

REYNOLDS & SON
vs.
SOUTH FORK CANAL COMPANY.

Ralph Reynolds, senior, and Ralph Reynolds, junior, merchants and traders doing business under the name and style of Reynolds & Son, plaintiffs in this action, complain of the South Fork Canal Company, defendants, for that said defendants executed their two several promissory notes to the said plaintiffs, in the words and figures following:

$10,000. No. 6.

SOUTH FORK CANAL COMPANY,
Placerville, May 22, 1853.

Sixty days after date, for value received, South Fork Canal Co. promise to pay Reynolds & Son, or bearers, ten thousand dollars, with interest at the rate of four and half per cent. per month from date.

By order of the board of trustees.

WM. H. SMITH, *Pres. pro tem.*

723 A. T. TAYLOR, *Sec'y.*

Which said note has an indorsement thereon in the following words and figures: $450—paid on the within 1 mo. interest, due the 22 inst., four hundred and fifty doll's.

C. C. BATTERMAN, *Sec'y.*

Also—

$3,123 66. No. 10.

SOUTH FORK CANAL COMPANY,
Placerville, June 6th, 1853.

Ten days after date, for value received, South Fork Canal Company, promise to pay Reynolds and Son, or bearer, thirty-one, twenty-three, $\frac{66}{100}$ dollars, with interest at the rate of three per cent. per month from date. By order of the board of trustees.

W. H. SMITH, *Pres. pro tem.*

A. T. TAYLOR, *Sec'y.*

Which said note bears indorsements in the following words and figures: $93.70—paid on the within 1 mo. interest, ninety-three $\frac{70}{100}$ doll's. July 8, 1853.

C. C. BATTERMAN, *Sec'y.*

$93 70—paid on within 1 mo. in'st., ninety-three $\frac{70}{100}$ doll. Aug. 9, 1853.

C. C. BATTERMAN, *Sec'y.*

Also their promissory note in the following words and figures:

724 $263 54. No. 92.

SOUTH FORK CANAL COMPANY,
Placerville, June 6, 1853.

Sixty days after date, for value received, South Fork Canal Co. promise to pay Caner Hank, or bearer, two hundred and sixty-three $\frac{54}{100}$ dollars, with interest at the rate of three per cent. per month from date. By order of the board.

WM. H. SMITH, *Pres. pro tem.*

A. T. TAYLOR, *Sec'y.*

Which note is indorsed as follows: $15 81—paid on the within 2 mo. interest, fifteen $\frac{81}{100}$ doll. Aug. 9, 1853.

C. C. BATTERMAN, *Sec'y.*

Which said promissory notes remain due and unpaid, and which the said South Fork Canal Company have refused and neglected to pay, or any part thereof, and still neglect and refuse to pay the same, although often requested so to do, to the great damage of plaintiff, to wit, the sum of thirteen thousand three hundred and eighty-seven $\frac{20}{100}$ dollars. Wherefore they bring this action and pray judgment for their debt aforesaid of $13,387\frac{20}{100}$ (thirteen thousand three hundred and eighty-seven $\frac{20}{100}$ dollars) and damages, and their
725 costs in this behalf expended.

REYNOLDS & SON,
By HALL & ANDERSON, *Att'ys for Pl'ffs.*

STATE OF CALIFORNIA, *County of Eldorado:*

Appeared personally before me Ralph Reynolds, junior, pl'tff in the foregoing action, who makes oath and says that the matters and things contained in the foregoing complaint are true of his own knowledge, except as to the matters and things therein mentioned on information or belief, and that as to these matters he believes them to be true.

R. REYNOLDS, JR.

Subscribed and sworn to before me, the undersigned, a notary public in and for said county, on this eleventh day of August, 1853. As witness my hand and seal.

GAVEN D. HALL, *Notary Public.*

Indorsed: 202.—Reynolds & Son, complain't, *vs.* South Fork Canal Co.—Complaint.—Filed August 11, A. D. 1853.

J. GORDON, *Cl'k.*

726 STATE OF CALIFORNIA, *Eldorado county, ss:*

RALPH REYNOLDS *et al.*, plaintiffs,
vs.
THE SOUTH FORK CANAL CO., defendant.

The people of the State of California to the South Fork Canal Company, defendants in this suit, greeting:

You are hereby summoned to be and appear before the honorable district court of the eleventh judicial district, in and for said county and State, to answer to the complaint of Ralph Reynolds, senior, and Ralph Reynolds, junior, now on file in this office, wherein they pray judgment against you for the sum of $13,387\frac{20}{100}$ debt due pl'ff on certain promissory notes by you executed in the amounts as described in the accompanying complaint. And you are hereby required to answer the said complaint within 10 days, if service hereof be had on you within this county; within twenty days, if out of this
727 county, but in said district, and within forty days, if out of said county and district, (exclusive of the day of service;) and hereof fail not, &c., or said pl'ffs will take judgment against you by default for said sum of $13,387\frac{20}{100}$, with interest and costs.

Witness my hand with the seal of said court hereto affixed, at office in Coloma, this the 11th day of August, A. D. 1853.

[SEAL.] JOSIAH GORDON, *Clerk*,
By GEO. W. GORDON, *Dep. Cl'k.*

Indorsed: No. 202.—District court.—Reynolds & Son, plaintiffs, *vs.* South Fork Canal Co., defendant.—Summons.—Sheriff's fees, lev'g summons, and 24 miles travel, $15—unpaid.

728 *Summons.*

STATE OF CALIFORNIA, *Eldorado County:*

I hereby certify that I have served the within summons by delivering a copy thereof, attached to a certified copy of the complaint, to C. C. Batterman, secretary of the South Fork Canal Company, personally, on the 12th day of August, A. D. 1853, in Eldorado county.

WM. BUCHANAN, *Sheriff*,
By A. STC. DENVER, *Under Sheriff.*

729 *Affidavit for attachment.*

In district court, 11 judicial district.

STATE OF CALIFORNIA, *County of Eldorada:*

This day personally appeared before me, the undersigned, a notary public duly commissioned and qualified as such, Ralph Reynolds, jr., who being duly sworn, says that the South Fork Canal Company are indebted to Ralph Reynolds, jr., and Ralph Reynolds, sr., in the sum $13,380\frac{11}{100}$ *dollars*, upon contracts express for the direct payment of money, after allowing all legal setoffs or counter claims; that such contract was made after the passage of an act entitled An act to

regulate proceedings in civil cases in the courts of justice of this State, passed April 29th, 1851; that said amount has not been secured by any mortgage upon real or personal property.

Sworn and subscribed before me this 11th day of August, 1853.

Witness my hand and seal of office, at office in the town of
730 Placerville, Eldorado county.

[SEAL.] R. REYNOLDS, JR.

G. D. HALL, *Notary Public.*

Indorsed: No. 202.—Reynolds & Son *vs.* South Fork Canal Company.—Affidavit.—Filed August 11th, A. D. 1853.

JOSIAH GORDON, *Clerk,*
By GEO. W. GORDON, *Deputy.*

Undertaking for attachment.

Know all men by these presents, that we, Ralph Reynolds, sr., and Ralph Reynolds, jr., as principals, and Jos. White and W. J. Burrell, as sureties, are held and firmly bound unto the South Fork Canal Company in the sum of ten thousand dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs,
731 and executors, firmly and severally by these presents.

Witness our hands this 11th day of August, 1853.

The condition of the above obligation is such, that whereas the abovenamed Ralph Reynolds, s'r, and Ralph Reynolds, j'r, have this day commenced suit by attachment against the South Fork Canal Company for the sum of $\$13,380\frac{20}{100}$, in the district court of the 11th judicial district for the county of Eldorado: now if the said South Fork Canal Company shall recover judgment against the plaintiffs in said suit, and the said plaintiffs shall pay all costs that may be adjudged and all damages that said company may sustain by reason of said attachment, then this obligation to be void; otherwise, in full force.

R. REYNOLDS, SEN'R.
R. REYNOLDS, JU'R.
JOS. WHITE.
W. J. BURWELL.

732 Indorsed: 202.—Reynolds & Son *vs.* South Fork Cana Company.—Undertaking approved and filed August 11th, A D. 1853.

JOSIAH GORDON, *Cl'k,*
By GEO. W. GORDON, *Deputy.*

Attachment.

STATE OF CALIFORNIA, *County of Eldorado, ss:*

The people of the State of California to the sheriff of Eldorado co., greeting:

Whereas Ralph Reynolds, senior, and Ralph Reynolds, j'r, have commenced a suit in the district court in and for said county, against

the South Fork Canal Company, for the sum of $13,387$\frac{22}{100}$ *dollars*, with interest and costs; and whereas the said Ralph Reynolds, j'r, has made the affidavit and given the undertaking required by
733 chapter fourth of the act to regulate proceedings in civil cases, approved April, A. D. 1851: Now, therefore, these are to command you to attach and safely keep all the property of the said South Fork Canal Company within your county, not exempt from execution, or so much thereof as will be sufficient to satisfy the demand of the said Ralph Reynolds, senior and j'r, as above specified, unless the said South Fork Canal Company give your security, by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy said demands, besides costs, in which case you are to take such undertaking.

This you will in nowise omit, but make due return of this writ to the clerk of the district court in and for said county, and how you have executed the same.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at office in Coloma, on this
734 11th day of August, A. D. 1853.

[SEAL.] JOSIAH GORDON,
Clerk of Eldorado Co., Cal.,
By GEO. W. GORDON, *Dep'y Cl'k.*

Indorsed: No. 202.—Dist. court.—Reynolds & Son, pl'ffs, *vs.* South Fork Canal Co.—Attachment.—$572.

Sheriff's fees:

Levying attachment	$5 00
Copy of do	1 50
Serving notice	1 00
12 miles' travel	6 00
Copy filed with recorder office	2 00
	15 50

STATE OF CALIFORNIA, *Eldorado county:*

I hereby certify that I have executed the within writ by levying upon a flume 4 feet wide, 3 feet deep, and about 16 miles long, extending from Long Cañon to the large reservoir above Placer-
735 ville; also a ditch and flume, extending from the said reservoir to Coon Hollow ridge; also the three distributing ditches, also the large reservoir before mentioned, and the small reservoir on Coon Hollow ridge, and all the other works belonging thereto, as the property of the within-named def't, on the 12th day of July, A. D. 1853, at 7 o'clock a. m.; and also filed a copy of this writ, with description of the property attached, with the recorder of Eldorado county aforesaid; and also served a copy of this writ, with notice of the attachment, on C. C. Batterman, sec'y of said company.

WM. BUCHANAN, *Sh'ff*,
By A. STC. DENVER, *Under Sh'ff.*

Cost bill.

REYNOLDS & SON, pl'ff,
vs.
SOUTH FORK CANAL CO., def't. } No. 202.

Memorandum of pl'ff's costs:

736	Att'ys costs.....	$30 00		
	Costs paid cl'k.....	20 50		
			50 50	
	Costs due sheriff.....	30 50		
	" " clerk.....	19 00		Paid Oct. 20, 1853.
			49 50	
			$100 00	

Indorsed: No. 202.—Reynolds & Son *vs.* South Fork Canal Co.—Total, $100.—Memorandum of pl'ff's costs.

Judgment.

STATE OF CALIFORNIA, *Eldorado county:*

In the district court, 11th judicial district, in and for said county, November term, A. D. 1853.

SATURDAY, *November 26th*, A. D. 1853.

REYNOLDS & SON, pl'ffs,
vs.
THE SOUTH FORK CANAL CO., def'ts. } 202.

Now, upon this day, came the plaintiffs, by Hall and An-
737 derson, their attorneys, and move the court for an order of sale of certain attached property, to wit, "flume, 4 feet wide, 3 feet deep, and about 16 miles long, extending from Long Cañon to the large reservoir above Placerville; also a ditch and flume extending from the large reservoir to Coon Hollow ridge; also the three distributing ditches; also the large reservoir before mentioned, and the small reservoir on Coon Hollow ridge, and all the other works belonging thereto;" and it appearing to the satisfaction of the court that said property had been attached by the sheriff of this county, on the 12th day of July, A. D. 1853, and that a judgment by default had been entered herein against the said defendant, by the clerk of this court, being fully satisfied in the premises, it is therefore ordered that the foregoing property be sold by the sheriff, to satisfy
738 the judgment as recorded by the said plaintiff against the said defendants, by default, in vacation, as now appears upon the "judgment book," page 46 of this court.

A true and correct copy of the record of said court, to attest which I hereto set my hand and affixed the seal of said court, at office in Coloma, this 26th day of November, A. D. 1853.

[SEAL.] A. STC. DENVER, *Clerk*.

Indorsed: Reynolds & Son *vs.* South Fork Canal Co.—Copy of judgment.

Amended judgment.

In the district court, 11th judicial district in and for said county, January term, A. D. 1854.

WEDNESDAY, *February* 8, 1854.

REYNOLDS & SON, pl'ffs,
vs.
SOUTH FORK CANAL CO., def'ts. } 202.

STATE OF CALIFORNIA, *Eldorado county:*

739 The motion heretofore made herein to amend the judgment rendered in this cause having been held under advisement by the court, and the court being fully advised in the premises, sustained said motion.

It is therefore ordered and adjudged that the judgment heretofore rendered herein by the clerk in vacation, be amended by inserting in the same after the words "with interest on the sum of $1,111\frac{9}{100}$ *dollars*" the following, to wit: together with interest on the sum of ten thousand dollars at the rate of four and one-half per cent. per month, and on the sum of three thousand three hundred and eighty-seven $\frac{7}{100}$ dollars, at the rate of three per cent. per month from the 12th day of September, A. D. 1853, until paid.

Indorsed: 202.—Reynolds & Son *vs.* South Fork Canal Co.—Copy of amendment to judgment.

740 *Order of sale.*

STATE OF CALIFORNIA, *Eldorado County:*

The people of the State of California to the sheriff of Eldorado county, greeting:

Whereas, on the 12th day of September, A. D. 1853, Reynolds and Son, plaintiffs, recovered judgment in the district court of said county and State against the South Fork Canal Co., defendants, for the sum of thirteen thousand three hundred and eighty-seven $\frac{7}{100}$ dollars debt, with interest thereon of eleven hundred and eleven $\frac{9}{100}$ dollars, together with their costs of suit herein taxed at one hundred dollars; and whereas on the 26th day of November, A. D. 1853, an order was made by said court for the sale of certain attached property to satisfy said judgment, interest, and costs, to wit: a flume 4 feet wide, 3 feet deep, and about 16 miles long, extending from Long Cañon to the large reservoir above Placerville; also a ditch and flume ex-
741 tending from the large reservoir to Coon Hollow ridge; also the three distributing ditches; also the large reservoir before mentioned, and the small reservoir on Coon Hollow ridge, and all the other works belonging thereto:" These are, therefore, to command you to levy and cause to be made by distress and sale out of the foregoing described attached property the said sums as aforesaid, together with accruing costs, and that you make due return of this writ or order of sale within sixty days from its receipt by you.

By order of the court. To attest which I hereto set my hand and affix the seal of said court, at office in Coloma, this 3d day of January, A. D. 1854.

A. STC. DENVER, *Clerk*,
By A. D. WALDRON, *Dep. Cl'k.*

742 Indorsed.—202, District court.—Reynolds & Son pl'ffs, *vs.* South Fork Canal Co., def'ts.—Order of sale.—Attached property.

Debt	$13,387	20
Interest	1,111	92
Att'ys' costs	30	00
Clerk's, p'd by pl'ff	39	50
Sheriff's, p'd by pl'ff	30	50
	14,599	12
Clerk's fees, this ex., unpaid	10	59
Clerk's fees, this ex., unpaid	2	00
Total	14,611	62

Rec'd Jan'y 3, 1854, at 3 o'clock, p. m.
E. M. STROUT, *Under Sheriff.*

Order of sale No. 2.

STATE OF CALIFORNIA, *Eldorado County:*

The people of the State of California to the sheriff of Eldorado county, greeting:

743 Whereas, on the 12th day of September, A. D. 1853, Reynolds & Son recovered a judgment in the district court of said county against the South Fork Canal Company for the sum of thirteen thousand three hundred and eighty-seven $\frac{20}{100}$ dollars debt, with eleven hundred and eleven 92-100 dollars interest, together with one hundred dollars costs of suit; and whereas, on the 8th day of February, A. D. 1854, said judgment was amended by said court so that the sum of ten thousand dollars shall draw interest at the rate of four and one-half per cent. per month, and the sum of three thousand three hundred and eighty-seven 20-100 dollars interest at the rate of three per cent. per month, from the said 12th day of September, A. D. 1853, until paid; and whereas, on the 12th day of September, A. D. 1853, an order was made by said court directing the sale of certain property which
744 had been attached by the sheriff of said county, described as follows: "a flume 4 feet wide, 3 feet deep, and about 16 miles long, extending from Long Cañon to the large reservoir above Placerville; also a ditch and flume extending from the large reservoir to Coon Hollow ridge; also the three distributing ditches; also the large reservoir before mentioned and the small reservoir in Coon Hollow ridge, and all the other works belonging thereto;"

These are, therefore, to command you to cause to be sold at public sale according to law the foregoing described property, for the satisfaction of said debt, interest, and costs, together with accruing costs, and that you make due return of this writ within 60 days after its receipt by you.

Witness my hand and the seal of said court, affixed at office
745 in Coloma, this 22d day of February, 1854.

A. StC. DENVER, *Clerk.*

Indorsed: No. 202.—District court.—Reynolds & Son *vs.* the South Fork Canal Co.—Order of sale.—$193.

Debt	$13,387 20
Interest	1,111 92
Att'ys' fees	30 00
Costs due pl'ff	70 00
	14,599 12
Costs due clerk on subsequent proceedings and this order of sale	21 50
	14,620 62
Int. 7 26-30 mos	4,383 36
(For int., see inside, sheriff's costs.)	
Per cent. levy and adver'ts	708 69

Rec'd Feb'y 23d, 1854, at 9 o'clock a. m.

D. E. BUEL, *Sheriff*,
By E. N. STROUT, *Und. Sh'ff.*

746 Rec'd of L. T. Carr sixty-one dollars and sixty-eight cents, being part of the sheriff's costs, April 17th.

D. E. BUEL, *Sh'ff.*

Received of D. E. Buel, sheriff, the full amount of the within execution.

L. T. CARR.

I hereby return this order of sale satisfied in full by the sale of the within ordered property, after due notice according to law, to Thomas H. Williams, he being the highest bidder, for the sum of $41,194 $\frac{63}{100}$, the overplus being applied to the satisfaction in part of an execution issued from the 4th judicial district in favor of Benj. F. Moulton and against the South F. Canal Company, this 8th day of May, A. D. 1854.

D. E. BUEL, *Sheriff*,
By E. M. STOUT, *Under Sh'ff.*

Assignment of judgment.

Whereas, on the twelfth day of September, A. D. 1853, in the district court of the eleventh judicial district, in the county of Eldorado, State of California, R. Reynolds, sen., and R. Reynolds, jun'r,

747 did recover judgment against the South Fork Canal Company, a corporation existing in said county, for the sum of fourteen thousand four hundred and ninety-nine 12-100 dol'ars debt and interest, and one hundred and twenty-one dollars and fifty cents costs, as by the record thereof now remaining in said court will appear: Now know all men by these presents, that the *the* said R. Reynolds, sen., and R. Reynolds, jr., for and in consideration of the sum of eighteen thousand three hundred and thirty-four 46-100 dollars to us in hand paid by Levi T. Carr, of said county and State, the receipt whereof we do hereby confess and acknowledge, have granted, bargained, sold, assigned, transferred, and set over unto the said Levi T. Carr, his executors, administrators, and assigns, the said judgment so recovered, as aforesaid, against the said South Fork Canal Company, and all the benefit and advantage, interest, sum and sums of
748 money, that may be had, obtained, or gotten by reason or means of the said judgment or any proceedings to be had thereon; hereby authorizing the said Carr to collect and enforce payment thereof in our names or otherwise; but this assignment is made and taken in all respects at the risk of the said Carr, who is to collect the same at his own expense and not to subject the said Reynolds & Reynolds, or either of them, to the payment of any costs or expenses whatever, and that the said Reynolds & Reynolds shall not be responsible or chargeable for any costs upon said judgment which have in any manner accrued since the rendition thereof.

Witness our hands and seals this thirty-first day of March, A. D. 1854.

R. REYNOLDS, SEN'R. [SEAL.]
R. REYNOLDS, JR. [SEAL.]

Indorsed: R. Reynolds, sen., and R. Reynolds, jr., to Levi T. Carr.—Assign't of judgment.—Filed April 3d, A. D. 1854.

A. STC. DENVER, *Clerk.*

749 *Application for receiver.*

STATE OF CALIFORNIA, *Eldorado County:*

Personally appeared before me Thos. H. Williams, who being sworn, says that on Monday, the 8th day of May, 1854, he became the purchaser of the South Fork canal flumes, ditches, reservoirs, &c., situated in said county, and east of the city of Placerville, at the price of $41,194 83, at a sheriff's sale upon two executions issued upon two judgments obtained against said South Fork Canal Company, one in favor of Reynolds & Son, obtained in the district court for said county for the sum of about $19,000, including interest and costs, the other in favor of B. F. Moulton, obtained in the district court for the 4th judicial district, for about the sum of $20,000, including interest and costs; that the said purchase was made at Coloma in said county, at sheriff's sale upon said executions; that on said 8th day of May the said sheriff of Eldorado county
750 executed to affiant a certificate of sale, and filed a duplicate thereof in the office of the recorder of said county; that the

money arising from the use of said property, according to the information and belief of affiant, is about $2,000 per week; that there has been received by said South Fork Canal Company from the use of said property since said sale about $1,500 dollars or more, according to information and belief of affiant; that they are now in the possession of said property and in the enjoyment of the receipts arising therefrom; that they have failed and refused to pay over that already collected or any part thereof to affiant, and also refuse to allow him to collect or receive the receipts, rents, and profits now accruing from the same. He states that the district court for said county will adjourn on to-morrow; that there will be no other term of said court till August next; that the receipts arising from said work by
751 that time will probably amount to $25,000 or thereabouts; that he has heretofore neglected to make an application to the court for a receiver to be appointed to take charge of said receipts and pay them over to affiant on account, on account of a conversation he had with the president and some of the trustees of said company, (which is a corporation,) in which he understood a receiver should be appointed by consent of the parties, to receive said moneys and pay them to affiant; that he expected said arrangement to be made by consent until an hour since, when he was informed by the president of said company that he could not now consent to the appintment of such a receiver; that said president is now in the town of Coloma.

Wherefore he prays that a shorter time be prescribed by your honor than usually required by statute for said South Fork
752 Canal Company to appear in said court and show cause, if any they can, why a receiver should not be appointed to receive said moneys and pay them over to affiant, and that your hon. appoint some hour to-morrow for the hearing of said application.

THOS. H. WILLIAMS.

Subscribed and sworn to before me this the 15th day of May, 1854.

A. C. MONSON, *Dist. Judge.*

STATE OF CALIFORNIA, *Eldorado county:*

Having read the foregoing affidavit of Thos. H. Williams, I order that the South Fork Canal Co. therein named appear before the dist. court, at the court-rooms in the town of Coloma, said county, at the hour of 10 o'clock a. m., on the 16th day of May, A. D. 1854,
753 to show cause why a receiver should not be appointed as prayed for in the foregoing affidavit.

Given under my hand at chambers in Coloma, on this the 15th day of May, A. D. 1854.

A. C. MONSON, *Dist. Judge.*

I hereby acknowledge service of the foregoing affidavit and order, and waive copies of the same and waive written notice of the application for the appointment of receiver, this 15 May, A. D. 1854.

O. HARNEY,
Pres. South Fork Canal Co.

Indorsed: Application.—Thos. H. Williams *vs.* South Fork Canal Co.—Filed May 16, A. D. 1854.

A. STC. DENVER, *Clerk*,
By A. D. WALDRON, *Dep. Cl'k.*

754 *Order of court.*

Now on this day comes Thos. H. Williams and moves the court, upon his affidavit filed this day, to appoint a receiver to receive from the corporation of the South Fork Canal Co. and their agents all of the rents, profits, and moneys arising from the use and sale of water from the flumes, ditches, reservoirs, aqueducts, and canals of said co. lying and being in Eldorado county, Cal'a, east of the city of Placerville, and being the same extending from Long Cañon to Coon Hollow, and two distributing branches, being the same purchased by said Williams at sheriff's sale on the 8th day of May, A. D. 1854, and pay the same to said Williams on his order; said motion, being fully advised in the premises, it is ordered and decreed that Josiah Gordon be and is hereby appointed said receiver, with full power to collect, receive, and receipt for, to and from said South
755 Fork Canal Co. and their agents and employees, all of the moneys arising from the sale, use, and rents of the aforesaid flumes, canals, aqueducts, reservoirs, and distributing branches, and from the water flowing through the same from and after the 8th day of May, A. D. 1854, and that he pay over said money to the aforesaid Thos. H. Williams or his order, and that said Gordon execute bond, with sureties, in the sum of ten thousand dollars for the faithful performance of the duties of receiver as aforesaid, and upon filing said bond with the clerk of this court, approved by said clerk, he shall enter upon the discharge of his duties as such receiver.

Indorsed: Reynolds & Son *vs.* S. F. C. Co.—Order of court.

756 *Bond of receiver.*

Know all men by these presents, that we, Josiah Gordon, as principal, and S. S. Brooks, S. N. Nichols, George Searls, and , as sureties, are held and firmly bound to the South Fork Canal Co. and Thos. H. Williams, or either of them, in the sum of ten thousand dollars, jointly and severally, for the payment of which well and truly to be made we jointly and severally bind ourselves, our heirs, assigns, *assigns*, executors, and administrators forever.

The conditions of the above obligation is such that whereas, on the 16th day of May, A. D. 1854, the district court, 11th judicial district, Eldorado county, Cal'a, appointed the said Josiah Gordon a receiver, with full power and authority to collect, receive, and receipt for from the said South Fork Canal Co., their agents and em-
757 ployees, all of the moneys arising from the use, rents, and profits of all the ditches, canals, flumes, aqueducts, and reservoirs of said South Fork Canal Co., situate in said county east of the

city of Placerville, being the same purchased by said Thos. H. Williams at sheriff's sale on the 8th day of May, A. D. 1854; also to collect and receive all moneys as aforesaid arising from the sale of water from and after said 8th day of May, A. D. 1854, from water flowing through said canals, aqueducts, flumes, and reservoirs, and pay all of the aforesaid moneys to the said Thos. H. Williams, or his order. Now should the said Josiah Gordon well and truly discharge all of the duties as receiver aforesaid, and pay over all of said moneys to the said Thos. H. Williams, then this obligation to become void; otherwise to remain in full force and virtue. Given under
758 our hands and seals this the 16th day of May, A. D. 1854.

JO. GORDON. [SEAL.]
S. S. BROOKS. [SEAL.]
S. N. NICHOLS. [SEAL.]
GEORGE SEARLE. [SEAL.]

Indorsed: Reynolds & Son *vs.* South Fork Canal Co.—Bond of Josiah Gordon as receiver.—Approved and filed May 16, 1854.

A. STC. DENVER, *Clerk.*

STATE OF CALIFORNIA, *County of Eldorado, ss:*

I, Wm. A. January, clerk of the district court of the 11th judicial district of said State, in and for said county, do hereby certify the foregoing to be full, true, and correct copies of all the papers on file in the case of R. Reynolds & Son *versus* The South Fork Canal
759 Co., to wit, complaint, summons, affidavit, and undertaking on attachments, attachment, memorandum of plaintiffs' costs, judgments, amendment to judgment, order of sales and returns thereon, assignment of judgment, affidavit on application for appointment of receiver, order appointing receiver, and bond of receiver.

Witness my hand and the seal of the said court hereto affixed at office in the city of Placerville this 27th day of May, A. D. 1861.

WM. A. JANUARY, *Clerk.*
[SEAL.] By OGDEN SQUIRES, *Deputy.*

Indorsed: Filed July 15th, 1862.

HENRY C. HYDE, *Clerk.*

760 *Order.*

At a regular term of the circuit court of the United States of America in and for the northern district of California, held at the court-house in the city of San Francisco, on Monday, the 1st day of June, in the year of our Lord one thousand eight hundred and sixty-three.

Present: the honorable Stephen J. Field, associate justice of the U. S. Supreme Court; the honorable Ogden Hoffman, U. S. district judge.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO. } In equity.—(O. C. No. 25.)

And now at this day it is ordered by the court that, in accordance with an act of Congress entitled "An act to provide circuit court for

the districts of California and Oregon, and for other purposes," approved March 3d, 1863, all actions, suits, prosecutions, causes, pleas, process, and other proceedings relative to any cause, civil or
761 criminal, heretofore pending in or returnable to the circuit court of the United States for the districts of California, in and for the northern district, be and they are hereby respectively transferred, made returnable, and continued to this court.

Indorsed: Filed this 20th day of July, 1863.

GEO. C. GORHAM, *Clerk*,
P'r HYDE, *D. C.*

Order.

Circuit court of the United States, northern district of California, in equity.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL COMPANY *et al.*

And now at this day, this cause having been set for to-day, come the parties hereto, by their respective counsel, E. W. F.
762 Sloan, esq., for complainant, and J. B. Haggin, esq., for defendants, and said cause was submitted to the court upon briefs to be filed within twenty days.

A true copy of proceeding had in said cause in said circuit court at the regular June term thereof, 1863, held July 28th, 1863.

Attest:

GEO. C. GORHAM, *Clerk.*

Sept. 11, 1865.

Order.

Circuit court of the United States, northern district of California, in equity.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL CO. *et al.*

And now at this day, this cause having been heretofore argued and submitted to the court, and due deliberation being had in the
763 premises, it is ordered that an interlocutory decree be entered declaring the complainant entitled to a lien upon the canal of the South Fork Canal Company for the labor performed and materials furnished under the contract entered into March 16, 1863, between Gordon and Kinyon and the canal company, a directing a reference to Henry C. Hyde, hereby appointed a special master in this case to take and state the accounts of the complainant, and report to this court.

A true copy of the proceedings had and order made in said cause on the 31st day of August, 1863, in said circuit court, at the regular June term thereof.

Attest: GEO. C. GORHAM, *Clerk.*

Sept. 11, 1865.

764 *Order.*

Circuit court of the United States, northern district of California, in equity.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL COMP. *et al.*

And now at this day, with the consent of Mess. Sol. Sharp and J. G. Baldwin, counsel for the respective parties, in open court expressed, it is ordered that the order directing an interlocutory decree herein made on the 31st day of August, 1863, be and it is hereby vacated and set aside.

A true copy of proceedings had and order made in said cause on the 4th day of Sept., 1863, at the regular June term of said circuit court.

Sept. 11, 1865.

Attest: GEO. C. GORHAM, *Clerk.*

765 *Order.*

Circuit court of the United States, northern dist. of California, inequity.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL COMP'Y *et al.*

And now at this day, this cause having been duly set for to-day, came on to be heard, and the same was thereupon argued by Messrs. Sol. Sharp and E. W. F. Sloan, on the part of the complainant, and Mr. J. G. Baldwin, on the part of defendants, and submitted to the court for its consideration and decision, with leave to both sides to file briefs within five days.

A true transcript of proceedings had in said cause June 18, 1864, at the regular June term of said circuit court.

Attest: GEO. C. GORHAM, *Clerk.*

766 *Memorandum Judgment.*

United States circuit court, northern district of California.

GEORGE GORDON
vs
SOUTH FORK CANAL COMPANY *et al.*

Memorandum of the judgment of the court upon which a decree in due form is to be drawn up.

This cause having been submitted on the pleadings and proofs and proceedings therein, and argument of counsel having been heard, the the court is of opinion:

1st. That the demand of the complainant for the work performed

upon and the materials furnished and used in the construction of that portion of the flume or canal of the South Fork Canal Company extending from section seventeen to section twenty-five, inclusive, (being
767 that portion in relation to which the agreement between Alonzo Kinyon and George Gordon, of one part, and the South Fork Canal Company of the other part, was entered into on the sixteenth of March, 1853,) to the extent of reasonable value thereof, is a just and valid demand against the South Fork Canal Company, and a lien upon the said portion of the flume or canal of the company paramount to any and all other liens or charges thereon, real or pretended, as set forth in the pleadings.

2d. That the expenses incurred for mills, tools, or any materials whatever, not used in the construction of said portion of the flume or canal do not constitute a valid demand against the South Fork Canal Company, or any lien upon any portion of its flume or canal; and

768 3d. That the release mentioned in the pleadings executed by Alonzo Kinyon to the South Fork Canal Company, on the 28th of June, 1853, is fraudulent and void.

The case will therefore be referred to a special master to take and state an account of the value of the work performed and materials furnished as aforesaid, by Gordon and Kinyon, or either of them, under the contract of March 16, 1853, and report the same to the court.

The master will estimate the value of the work and materials with reference to the market rates existing at the time. He will also compute the amounts of interest due on the estimated value of the work and materials from the thirteenth of June, 1853, to the time of making the computation, at the rate of ten per cent. per annum.

769 The master will further ascertain and report the amount paid in cash by the South Fork Canal Company to Kinyon for the release executed by him to the company, on the 28th June, A. D. 1853, and the amount paid in stock of the company, and the cash market value of the same at the time.

He will also ascertain and report what sum or sums of money, if any, have been paid by the South Fork Canal Company, to the complainant on account of the contract of March 16, 1853, and the date or dates thereof.

In ascertaning and stating the matters aforesaid, the master will consult the pleadings, exhibits, and depositions herein, and may take such other evidence legitimate and pertinent thereto as the parties, or either of them, by their respective solicitors may properly submit, with leave to either to except thereto.

770 All further directions will be reserved until the coming in of the master's report.

October 10, 1864.

FIELD, *Circuit Judge.*

Indorsed: Filed Oct. 10, '64.

GEO. C. GORHAM, *Clerk.*

Interlocutory decree.

Circuit court of the United States, for the northern district of California.

GEORGE GORDON
v.
SOUTH FORK CANAL COMPANY *et al.* } Interlocutory decree.

This cause coming on to be heard upon the pleadings, exhibits, depositions, orders pro confesso, and other orders therein entered, was argued by counsel, and it appearing from the pleadings and
771 proofs aforesaid, that the complainant, George Gordon, is entitled to be relieved touching the matters contained in the original bill of complain therein:

It is ordered, adjudged, and decreed by the court, that the demand of the above complainant, set forth and alleged in said bill against the said South Fork Canal Company, for the work performed upon and the materials furnished and used in the construction of that portion of the flume or canal of the South Fork Canal Company extending from section seventeen to section twenty-five, inclusive, being that portion in relation to which the agreement between Alonzo Kinyon and George Gordon of the one part, and the South Fork Canal Company of the other part, was entered into on the sixteenth of March, eighteen hundred and fifty-three, (1853,) to the extent of reasonable value thereof, is a just and valid demand against the South Fork Canal Company, and a lein upon
772 the said portion of the flume or canal of the company paramount to any and all other leins or charges thereon, real or pretended, set forth in the pleadings; and the said complainant is hereby decreed to hold a valid statutory lein for the payment of said demand on said portion of said South Fork canal, and that the same is and is hereby declared to be paramount to any and all other liens or charges thereon, whether real or pretended, set forth or mentioned in said pleadings.

It is further ordered, adjudged, and decreed that the original instrument mentioned in the pleadings, executed by the said Alonzo Kinyon to the said South Fork Canal Company, on the 28th day of June, A. D. 1853, and of which Exhibit F is a copy, purporting to acquit, release and discharge the said South Fork Canal Com-
773 pany of and from all debts, claims, demands, or liabilities to the said Gordon & Kinyon on account of work or labor performed or materials furnished by them, or either of them, under the said contract, of which Exhibit A is a copy, or otherwise arising out of said contract, be, and the same is hereby, declared to be fraudulent and void as to the complainant, George Gordon; and as between him and the said company, said instrument is hereby set aside, and held for naught.

It is further ordered, adjudged, and decreed that it be referred to Henry C. Hyde, esq., a master hereby especially appointed for that purpose, to take and state an account of the value of the work performed and materials furnished as aforesaid by the said Gordon &

Kinyon, or either of them, under said contract of March 16,
774 1853, and report the same to this court with all convenient speed.

The said master is hereby directed to estimate the value of the work performed and the materials furnished, with reference to the market rates existing at the time said work was done and materials furnished. He is also directed to compute the amount of interest due on the estimated value of said work and materials from the 13th day of June, A. D. 1853, to the time of making such computation, at the rate of ten per centum per annum.

Said master is further directed to ascertain, state, and report what amount was paid in cash by the South Fork Canal Company to said Alonzo Kinyon, for or on account of said release executed by him to said company on the 28th day of June, A. D. 1853, of which Exhibit F is a copy; also what was the nominal amount paid to
775 him therefor in stock of the said company, and the cash market value of the same at that time.

He is further directed to ascertain and report to this court what sum or sums of money, if any, have been paid by said "South Fork Canal Company" to the said complainant on account of said contract of March 16th, 1853, and the date or dates thereof respectively.

And for the better taking and stating of said account, and the ascertaining and stating the matters aforesaid, the said master is hereby authorized and directed to consult the pleadings, exhibits, and depositions herein; also such other evidence legitimate and pertinent thereto as the parties on either side, by their respective solicitors, may properly submit, with leave to either to except thereto.

776 It is ordered, adjudged, and decreed that all further directions are reserved until the coming in of the master's report.

Ordered, adjudged, and decreed this 13th day of October, A. D. 1864.

The clerk will enter the above decree.

FIELD, *J.*

Indorsed: Filed Oct. 13, 1864.

GEO. C. GORHAM, *Clerk*,
Per HUESTIS, *D. C.*

Master's report.

In the circuit court of the United States in and for the northern district of California, in equity.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL COMPANY *et al.* } Master's report.

777 To the honorable, the judges of the circuit court of the United States in and for the northern district of California:

In pursuance and in virtue of an interlocutory decree of this court made in the above-entitled cause, and bearing date the 13th day of

October, A. D. 1864, by which it was referred to the undersigned, special master of this court, thereby appointed, to take and state an account of the value of the work performed and the materials furnished by George Gordon and Alonzo Kinyon, or either of them, under the contract between said Gordon and the South Fork Canal Company, dated March 16th, 1853, and used in the construction of that portion of the flume or canal of the South Fork Canal Company extending from section 17 to section 25, inclusive; and to estimate such value of the work done and the materials furnished,
778 with reference to the market rates existing at the time said work was done and materials furnished; and to compute the amount of interest due on the estimated value of said work and material from the 13th day of June, A. D. 1853, to the date of making such computation, at the rate of ten (10) per centum per annum; and to ascertain, state, and report what amount was paid in cash by the South Fork Canal Company to said Alonzo Kinyon for or on account of a certain release in said decree mentioned, executed by him to said company on the 28th day of June, 1853, and what was the nominal amount paid to him therefor in stock of the said company, and the cask market value of the same at that time; and to ascertain and report to this court what sum or sums of money,
779 if any, have been paid by said South Fork Canal Company to the said complainant, on account of said contract of March 16th, 1853, and the date or dates thereof, respectively; and to consult the pleadings, exhibits, and depositions herein, and to take such other evidence, legitimate and pertinent thereto, as the parties on either side might properly submit, and to report the same to this court with all convenient speed.

I, the subscriber, master in equity of said circuit court, so specially appointed herein, residing in the city of San Francisco, in said northern district of California, do respectfully certify and report that for the better taking and stating the said account, and ascertaining and stating the matters aforesaid, I have consulted the pleadings, exhibits, and depositions in this case; and have also taken such
780 evidence as the parties on both sides have submitted to me, that is to say, the testimony of George Gordon, a witness on the part of complainant, there being no testimony produced on the part of defendants.

That from the testimony so taken before me, and the testimony already of record in the case, contained in the depositions of the witnesses for the respective parties, which I have consulted as to the matters referred to me by said decree, I have computed and ascertained the value of the work performed and the materials furnished by said George Gordon and Alonzo Kinyon, under the said contract, up to the said 13th of June, 1853, and used in the contruction of that portion of the flume or canal of the South Fork Canal Company extending from section seventeen to section twenty-five, inclusive, and my estimate of such value has been with reference to
781 the market rates existing at the time said work was done and materials furnished, and also with reference to the fact the

gold and silver coin of the United States was at that time the current money of the country; and I do find and report that the value of such work and labor performed and materials furnished was, at the time the same were so performed and furnished, as follows, to wit:

For the work actually performed on the canal, and the materials used and furnished in the actual construction on the particular line of the work and adjacent thereto, (a schedule of the items of which is hereto annexed and made a part hereof, marked Exhibit A,) the sum of seventy-six thousand five hundred and ninety-eight dollars and eighty-nine cents, ($76,598 89,) with interest on said
782 sum from the 13th day of June, 1853, up to the date of this report, to wit, the 30th day of November, 1864, at 10 per centum per annum, the sum of eighty-seven thousand eight hundred and eleven dollars and eighty-six cents ($87,811 86.)

Also for preliminary work and labor done and materials furnished upon the line of said canal, without which the same could not have been built, and so done and furnished for no other purpose than the building of said canal, such labor and materials consisting of the building of saw-mills, railroads, inclined plane, roads, clearings, blacksmith shops, timber slides, and other apparatus, (a schedule of the items of which is hereunto annexed and made a part hereof, marked Exhibit B,) the sum of sixteen thousand two hundred and fifty dollars and fifty
783 cents ($16,250 50,) with interest thereon from the 13th day of June, 1853, up to the date of this report, to wit, the 30th day of November, 1864, at 10 per centum per annum, the sum of eighteen thousand six hundred and twenty-nine dollars and thirty-two cents ($18,629 32,) making the aggregate sum of one hundred and ninety-nine thousand two hundred and ninety dollars and fifty-seven cents ($199,290 57,) which is subject to the credits hereinafter mentioned, to wit:

Payment, May 1st, 1853, the sum of two thousand two hundred dollars ($2,200 00;) interest thereon from May 1st, 1853, to date of this report, Nov. 30, 1864, the sum of two thousand five hundred and forty-seven dollars and sixty-nine cents ($2,547 69.)

Payment made, June 1st, 1853, the sum of four thousand
784 dollars ($4,000 00;) interest thereon from June 1st, 1853, to date of this report, Nov. 30th, 1864, the sum of four thousand five hundred and ninty-eight dollars and eighty-five cents ($4,589 75;) making the total sum of thirteen thousand three hundred and forty-six dollars and fifty-four cents ($13,346 54;) leaving the sum of one hundred and eighty-five thousand nine hundred and forty-four dollars and three cents ($185,944 03) now due the said complainant for the work and labor and materials aforesaid.

And I do further certify and report that I have ascertained from the evidence taken before me, and the evidence already in the case, the following facts, viz:

That the amount paid in cash by the South Fork Canal Company to Alonzo Kinyon, on account of his release of June 28th, 1853,
785 was two thousand dollars ($2,000.)

That the nominal amount paid to him, said Kinyon, in the stock of said company, on account of said release, was three thousand dollars ($3,000.)

That said stock had at that time no market or ascertained value.

That the only sums of money paid by said South Fork Canal Company to the complainant, on account of his said contract, were the following, to wit, the sum of two thousand two hundred dollars paid on or about May 1st, 1853, and the sum of four thousand dollars paid on or about the 1st day of June, 1853, making the aggregate sum of six thousand two hundred dollars ($6,200.)

And I do further report that I have attached hereto and made a part of this report the minutes of the proceedings and testimony had before me under said decree, which is marked Exhibit C. Also a paper coniaining reference to and extracts from such portions of the testimony in the case as bear upon the subjects referred to me under said decree, which is marked Exhibit D. All of which is respectfully submitted.

Dated at San Francisco this 30th day of November, A. D. 1864.

HENRY C. HYDE,
Master, &c., U. S. Cir. C't, North. Dist., Cal'a.

786 *Exhibit A, referred to in the foregoing report and made part thereof.*

Schedule of the items of work and labor performed and materials furnished by George Gordon and Alonzo Kinyon under the contract mentioned in the above report, and used upon the South Fork canal in its actual construction, from section seventeen to section twenty-five, inclusive, on the particular line of the work, to wit:

Saw logs: 150,000 feet, board measure, at $20 per thousand		$3,000 00
Extra work: Done by the day, by order of the company's superintendent—180¾ days' work, and superintending, $5 per day and 20 per cent. for superintendent		1,084 50
Grubbing done on the entire line		4,600 00
Grading: 6,457 yards earth work, at 50 cents a yard	$3,228 50	
4,567 yards hardpan, at $1 40 per yard	6,396 60	
388 yards rock blasted, at $6 per yard	2,328 00	
		11,953 10
Amount forward		20,637 60

787 Amount forward..... 20,637 60

Heavy timber: 1,500 feet at 40 cents	600 00	
25,000 feet, at 30 cents	7,500 00	
22,000 feet, at 25 cents	5,500 00	
21,000 feet, at 15 cents	3,150 00	
		16,750 00

Small timber: 76,500 running feet, at 10 cents	$7,650 00	
2,293 running feet, at 10 cents	229 30	
		7,879 30
Plank: 86,994 feet, board measure, at $85 per thousand	7,394 49	
212,500 feet, board measure, at $95 per thousand	20,187 50	
50,000 feet, board measure, at $75 per thousand	3,750 00	
		31,331 99
Total		76,598 89

San Francisco, November 30th, 1864.

HENRY C. HYDE,
Master, &c., U. S. Cir. Court, Nor. Dist., Cal'a.

788 *Exhibit B, referred to in foregoing report, and made part thereof*

Schedule of items of preliminary work and labor performed and materials furnished by George Gordon and Alonzo Kinyon under their said contract, and used in the construction of the said South Fork canal from section seventeen to section twenty-five, inclusive, to wit:

Railroads, inclined plane, hoisting and lowering apparatus, from the mills to the canal, valued at	$5,000 00
Roads, clearings, and timber slides	3,607 00
Blacksmith shops and charcoal piles	1,270 00
Seven camps, with offices, buildings for the men, &c.	5,276 00
Making total of	15,153 00

Of which one-half is deemed a fair proportion to be charged upon the canal, and which is not charged in the prices previously set forth, the whole work contemplated by the original contract being more than half completed; which one-half is $7,576 50

Amount forward	$7,576 50	
789 Amount forward	7,576 50	
Two steam saw-mills, with machinery adapted to the peculiar work required, and erected solely for the purposes of the canal, at a cost of	27,648 00	
Of which this sum was realized by the sale of said mills to E. Kirk	10,300 00	
Leaving a balance of	17,348 00	
Of which one-half is deemed a fair proportion to charge against the canal as aforesaid, to wit		8,674 00
Total		16,250 50

San Francisco, November 30th, 1864.

Exhibit C and Exhibit D.

Exhibit C and Exhibit D, referred to in the foregoing report, are separate and detached papers filed with said report.

San Francisco, November 30th, 1864.

HENRY C. HYDE,
Master, &c., U. S. Cir. Court, North. Dist., Cal'a.

Indorsed: Filed 2 December, 1864.

GEO. C. GORHAM, *Clerk*,
Pr. W. F. HUESTIS, *D. C.*

790 *Notice.*

In the circuit court of the United States in and for the northern district of California, in equity.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL COMPANY *et als.*

In pursuance of the authorities and directions contained in an order and interlocutory decree, made and entered in the above-entitled cause this day, I, the subscriber, master in equity of said court, specially appointed by said order and decree, do hereby notify you that I have assigned the day of October, A. D. 1864, at three o'clock in the afternoon, at the office of Solomon Sharp, esq., No. 625 Merchant street, in this city, as the time and place of the proceedings in this cause, and the matters in reference therein before me, the said master; and you are hereby notified to appear before me at said time and place.

Dated San Francisco, this 13th day of October, A. D. 1864.

Yours, &c., HENRY C. HYDE,
Master in Equity, U. S. Circuit Court, Northern Dist. of Cal'a.

791 To SOLOMON SHARP, Esq., and HALL MCALLISTER, Esq.,
Sol'rs and Counsel for Complainant.
And J. B. HAGGIN and J. B. CROCKETT, Esq.,
Sol'rs and Counsel for Defendants.

I direct the above notice to be served two days before the day of hearing therein named.

HENRY C. HYDE, *Master in Equity, &c.*

Service of the foregoing notice, and also notice of the hearing therein mentioned, is hereby admitted this 13th day of October, A. D. 1864, at the city of San Francisco, northern district of California.

J. B. HAGGIN,
SOL. A. SHARP, and
HALL MCALLISTER,
For Compl't.

I also served a copy of the above notice on Mr. J. B. Crockett, sol'r for defendants, on the same day, handing it to him in person, he declining to acknowledge service.

HENRY C. HYDE, *Master, &c.*

792 *Deposition of George Gordon.*

Circuit court of the United States for the northern district of California, in equity.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL COMPANY *et al.*

In the matter of the reference to Henry C. Hyde, master in equity, under the interlocutory decree in said cause, entered October , A. D. 1864.

SATURDAY, *October 15th*, 1864—3 o'clock, p. m.

Present: Henry C. Hyde, master; Sol. Sharp, esq., solicitor for complainant; Edward Tompkins, esq., solicitor for the South Fork Canal Company, substituted for Messrs. Baldwin and Haggin.

By consent of parties the hearing was adjourned until Monday, Oct'r 17th, 1864, at 1½ o'clock, p. m.

HENRY C. HYDE, *Master, &c.*

793 MONDAY, *October 17th*, 1864—1½ o'clock, p. m.

Present: Henry C. Hyde, master; Sol. Sharp, esq., sol'r for complain't; Edward Tompkins, esq., sol'r for South Fork Canal Co.

George Gordon, being duly sworn as a witness on the part of complainant, testified as follows:

Questions by Mr. Sharp:

Question 1. What is your name, age, residence, and occupation?

Answer. My name is George Gordon; residence, San Francisco; age, 45 years; occupation, contractor, engineer, and at present a sugar refiner.

Question 2. Are you the person named in the bill of complaint in this cause as the complainant?

794 Answer. I am.

Question 3. Please state, if you know, what work and labor was done, what materials were furnished and used in the construction of the flume or canal of the South Fork Canal Company, under the contract of March 16th, 1853, set forth in the complaint, and the reasonable value of the same at the time the work was done, and the materials furnished and used?

Answer. There was done the whole of the grubbing along the line of the canal under said contract; the entire amount of heavy timber for the whole contract was got out ready for putting up, and partly put up; the whole of the cross-sills for the entire contract were got out; and about one-fifth, that is, from one-fourth to one-fifth of the

braces, posts, and caps, called small timber in the contract, were also got out; there was seven-twelfths of the entire planking for the whole contract got out; there were one hundred and fifty thousand
795 feet, board measure, of saw-logs got out; the entire face of the cañon above the line of the canal for nine miles, said cañon being about 1,500 feet high, was cleared of loose rocks, fallen timber, and other debris, so as to keep the work and the workmen uninjured by materials falling from above them; there were from fifteen to twenty miles of roads, logging roads, bridges, and timber slides, made upon the plateau above the ravine, along the edge of the ravine, and down the slides of the ravine to the line of the canal; there was an incline plane railroad, double track, about two thousand feet long, down the slide of the ravine, with hoisting and lowering apparatus; cars and tracks, and, I think, 2,000 or 3,000 feet of heavy rope; there was from the head of the inclined railroad to the saw-mills a communicating railroad of about one thousand feet long; there were two steam saw-mills, fitted up with machinery, mortising, tenoning, jointing, expressly got up for this work; there were seven camps, with dwellings, cooking apparatus for workmen, stretched along the line of the
796 work; also blacksmith shop, appropriate tools, a large pile of charcoal, for use upon the line of the work; the whole of the grading was done, with the exception of about 1,200 cubic yards of rock blasting.

And the entire amount of labor and materials which I contracted to supply and perform were supplied and performed, except about 240,000 feet of plank, and about three-fourths of the small timber; the rock blasting abovenamed, and the putting the work together on the canal, and the nails and spikes.

(The testimony of the witness as to the entire performance of the contract is objected to by Mr. Tompkins, def'ts' sol'rs, on the ground that he must state the facts from which he draws his conclusion, and not his own, and such testimony received subject to the objection.)

The reasonable value of the work so done was ($93,843 00) ninety-three thousand eight hundred and forty-three dollars; this includes the materials so furnished.

The items of work done and materials furnished, of which
797 I have personal knowledge, and the reasonable value thereof, are as follows:

150,000 feet of lumber in saw-logs, board measure, at $20 per thousand	$3,000 00
Work done by the day by order of company's superintendent, 180¾ days' work, and superintending, $5 00 per day, and 20 per cent. for superintending.....	1,084 50

[Altered to read 20 per cent. at request of Geo. Gordon.
H. C. Hyde, *Master.*]

The grubbing was done for the entire line, and the value of it was, if standing as an item apart by itself, about	4,600 00

(This grubbing was actually worth that sum, although the contract price for that particular piece of work was $2,300, which was below cost.)

Grading: 6,457 yards earth-work, at 50 cents a yard		$3,228 50
4,569 yards hardpan, at $1 40 per yard		6,396 60
388 yards rock blasted, at $6 per yard		2,328 00
Total		11,953 10

Heavy timber:

798 All that I have actual knowledge of was 69,574 running feet which lay—21,000 feet or thereabouts at the head of the ravine slope, along the line of the canal; 22,000 feet put at the head of slides ready for shooting down; 25,000 feet was put down the slides to the canal, and 1,500 feet was in the work. These figures were taken somewhere betwen the 6th and 13th of June, (1853,) eighteen hundred and fifty-three.

The value of the above was:

1,500 feet, at 40 cts. per foot	$600 00	
25,000 feet, at 30 cts. per foot.	7,500 00	
22,000 feet, at 25 cts. per foot.	5,500 00	
21,000 feet, at 15 cts. per foot.	3,150 00	
Total		16,750 00

Small timber:

76,500 running feet of sills, caps, posts, and braces, value 10 cts. per foot	7,650 00	
2,293 running feet of same	229 30	
Total		7,879 30

Plank:

At mill and railroad slide, 86,944 feet, board measure, the value of which was $85 00 per thousand.	7,389 00	
799 At the lumber yard on the line of the canal, 212,500 feet, board measure, value of which was $95 00 per thousand.	20,246 00	
[Altered to read $95 00 at request of Geo. Gordon. H. C. Hyde, *Master.*]		
50,000 feet, board measure, plank placed at Long Cañon end of the work, at $75 per thousand	3,750 00	
Total.		31,385 00

Preliminary work done on the canal:

The railroads, inclined plane, hoisting and lowering apparatus from the mills to canal were of the value of—(Counsel for defendant objects to any evidence of the value of preliminary work, as not being within the decree and order of reference; testimony taken subject to such objection).....	$5,000 00	
Roads, clearings, and timber slides, (same objection.).....	3,670 00	
Blacksmiths' shops and charcoal piles, (same objection).....	1,270 00	
Seven camps, with offices, buildings for men, &c., (same objection).....	5,276 00	
Making a total of.....		$15,153 00
800 The half of which I deem a fair proportion to be charged against the company, as work and labor done on the canal, which they used and had the benefit of, and which is not charged on the prices which I have already given for specific work and materials..		7,576 50
There were also erected for the sole purposes of this work, two steam saw-mills, with all the machinery for getting out this peculiar kind of work by power, at a cost of.....		27,648 00
(This testimony is objected to by defendants' counsel as not coming within the decree and order of reference, and as not being work performed nor materials furnished on said canal, or under said contract, and received subject to such objection.)		
Of this amount, I got back from the sale of these mills as second-hand machinery $10,300, leaving a net 801 outlay out of pocket of $17,348. In my estimate, I charge one-half of this as work and labor done on the canal, not otherwise charged, making.....		9,674 00
Making in all.....		92,796 00

as the value according to this mode of estimate of the work and labor performed and materials furnished.

Hearing adjourned until Thursday next, October 20th, 1864, at 1½ o'clock p. m.

HENRY C. HYDE, *Master, &c.*
GEORGE GORDON.

Subscribed and sworn to before me this 27th day of October, A. D. 1864.

HENRY C. HYDE, *Master.*

THURSDAY, *October 20th*, 1864.—One and a half o'clock p. m.

Present: Henry C. Hyde, master; Soloman Sharp, esq., and E. W. F. Sloan, esq., sol'rs for complainant; Edward Tompkins, esq.,
802 sol'r for defendants, and George Gordon, the witness already sworn in the case.

It being agreed between the parties that the further testimony of this witness be taken by a short-hand reporter now present, Mr. Jabesh Clement, his testimony was so taken, and is as follows, to wit:

Testimony of George Gordon continued:

In answer to the question as to what was the reasonable value of the work done—

I made it out to be $93,843; I arrived at that value in three ways: one of the ways amounted to $92,796; another of the ways (methods, rather) amounting to $92,534, I arrived at as follows: I took the entire value of the whole contract, which amounted to $171,146, exclusive of engineers' commissions, which we had not to pay; the com-
803 pany paid those —

(Mr. Tompkins. I will note an objection to these statements. The question referred to being "What was the fair value of the labor, &c.," that is, the absolute value of the work and materials, and I object to this mode of proving it.)

Witness, continuing: The total value of the work, had it been entirely completed, exclusive of engineers' commissions, engineers' services, I should say, was $171,146; and that was fully completed, with the exception of an estimated value of $68,311; that left a balance of the value of the work already done of $102,834, from which might be, for perfect fairness, deducted the amount which the con-
804 tractors realized from the sale of their mills and machinery, after using them, $10,300; leaving as the net value of the work from that mode of estimate, $92,534. I also tested it by a third method, which went upon the assumption—the result of experience, however—that the cost of a thing and the contractor's profit on the thing is the value of the work, in the opinion of both the contracting parties, when the contractors have means for its profitable prosecution and are acquainted with their business. Now I stated as a matter of fact that the actual cost of the work and labor done and materials furnished on that canal, which the contractors paid, dollar for dollar, was $93,953 29, without any profit.

(Mr. Tompkins. All this is objected to as irrelevant, immaterial, and inadmissible under the decree.)

Witness, continuing: That sum was paid out for the work; then of
805 that amount was got back again, from the sale of the machinery after they had finished with it, $10,300, leaving a net outlay of $83,653, without profit; fifteen per cent. upon the net outlay is a moderate contractor's profit for such a work, which

amounts to $12,547, and that added to the cost makes a value of the work by that mode of estimate, of $96,200.

I then added the three estimates together, namely:

$92,796	00
92,534	00
96,200	00
281,530	00

I then added these together and divided the sum by 3 to make the answer I first gave, $93,843.

I will further state that it is almost impossible to estimate the value of the work and labor done and performed on that canal under this contract in any other way, for the reason that it was an entirely novel undertaking, to be prosecuted in a wild and mountainous country, where there were neither roads nor houses nor wells, and along
806 the precipitous side of a ravine, which could not be walked over; that the cost of putting one thousand feet of lumber into that work by itself alone would probably have been $1,000 per thousand feet; and that the values stated in the contract were arrived at by estimates upon them as an entirely ; the preliminary work necessary to be done before any part could be done being nearly one-third of the entire value of the contract; and if I am called upon to state the naked value of the specific number of feet of lumber got out and actually used in that work, and the specific value of the grading and blasting actually done upon the line of the canal, I must state it to be to the best of my knowledge and belief, $93,843.

Q. Between the sixth and the thirteenth of June, 1853, was there any work done on that portion of the canal? And if so, by whom?

Ans. Gordon and Kenyon, the contractors, continued on during
807 that work their full force of hands, doing their full amount of work.

Q. In that same connexion state when they ceased work—what day.

Ans. I cannot state the day; I know the date; they ceased to work on the 13th of June, 1853; that is to say, they ceased to prosecute new work; they continued along for a week or ten days or more—two weeks, I should think, clearing up and saving materials and getting them into shape for future use.

Q. At the date of the alleged settlement between Kenyon and the company, what value, if any, per share was the stock of the South Fork Canal Company? What, if any, was the cash market value of the stock of the company at or about that date?

Ans. I don't know exactly the date of that settlement; but some time about the 20th of June, with a view of making some proposition about stock to the company, I inquired its value, and I found no one who was willing to name a price which they would actually pay
808 in cash; the result that I arrived at in my own mind was—
(Mr. Tompkins. That I object to.)
Witness. Well, then, I could not tell you; I could not find

that it had a market value; that is the only answer I could give, because I could find no one who was willing to buy any of it.

The commissioner. Any price named or talked about?

Ans. No; no price named or talked about.

Mr. Sharp. It really had no market value?

Ans. That is the only answer I could give after making inquiries; that it had no market value.

The commissioner. What was the extent of your inquiries?

Ans. Well, I inquired of some three or four or five people,
809 I forget how many—up at Placerville, and along the line of the road as I came down, and I think once in Sacramento, and then here, of anybody—a dozen people, I suppose—anybody that I thought was interested in such things, or would be likely to buy.

Mr. Sharp. Did you receive any of the money or stock which was alleged to have been paid to Kenyon on the settlement?

Ans. No; I never received any.

Mr. Tompkins. That we object to as not within the decree.

Mr. Sharp. What was Kenyon's interest in the contract?

Ans. Kenyon was to receive one-third of the profits in the contract; he had no money in the contract.

[The word interest altered to money at the request of George Gordon.]

810 Mr. Tompkins. I object to that as not within the decree—to any evidence of anything between Mr. Gordon and Mr. Kenyon.

Mr. Sharp. State briefly what interest Mr. Kenyon had in the contract.

Ans. Mr. Kenyon had an interest of one-third in the profits of the contract, in consideration of which he was to superintend the work. I furnished all the money and transacted all the financial business, and was to receive and pay out everything.

Q. Was this known to the company?

Ans. I stated it at the time of making the contract to the directors. They knew it, I believe, individually and collectively—both as individuals and as a body.

Q. Did you have any acquaintance or relations with Kinyon?
811 Did you know him before the contract was made?

(Objected to as irrelevant and not within the decree.)

About 18 months previous to the contract I had employed Kinyon as a carpenter on some buildings of mine in San Francisco, and had recommended him to some employment from the city of San Francisco.

Q. Was he a man of any means?

Ans. He had no means. He was in debt to the company at the time of making the contract.

Q. What payments were made to you on account of the contract?

Ans. Sixty-two hundred dollars.

Q. Can you state about the time the payments were made? The first estimate, I suppose, was paid.

Ans. The first estimate was paid, and the next payment was
812 made somewhere about the first of June—somewhere around there—the first week in June. I forget the exact date of the payment.

Cross-examination—testimony of George Gordon:

Mr. Tompkins. Where did you reside at the time of making this contract?

Ans. San Francisco.

Q. What was the date of the contract?

Ans. About the middle of March, 15th or 16th of March, 1853.

Q. What business had you been engaged in?

Ans. My business was that of general contractor.

Q. What other work had you then on hand?

Ans. We were then building some docks—I think wharves—in San Francisco, and I had an interest in the Vulcan Foundry. I
813 think that is all we had on hand at that time. I was almost disengaged at the time of that contract.

Q. Had you no other contracts at that time than for wharves in San Francisco, and this?

Ans. No. I had a contract with the city of Sacramento touching their water works; but the only part that I executed in that contract was the importation of a cargo of iron pipe from Scotland for them. My connexion went no further.

Q. Were you not engaged at the same time in bidding and estimating on other contracts to a large extent, that you sought to obtain?

Ans. It is not improbable. I cannot recollect; but I bid and estimated on anything that was current; but to the best of my recollection I had no contracts at that time. The reason of my going
814 into this contract was because I was disengaged and had my means and appliances comparatively idle.

Q. Who personally superintended the work under this contract?

Ans. I generally superintended it. Under me were Kenyon, Callahan, Hewett, Hunt, Siddle, and Cochran—Richard Cochran.

Q. Did you change your residence from San Francisco during the progress of the work?

Ans. I suppose, during those months, I was three-quarters of the time upon the work, or between the work and San Francisco.

Q. In making up the bills for the lumber that you used or other materials, who made those bills?

Ans. I made them out myself. The orders were issued from my own desk.

Q. How did you arrive at the measurement of lumber which you have given here as making up the separate items of the ac-
815 count as you have stated them?

Ans. The last week that we worked I sent my foreman around to estimate the lumber and the material and the work, measure it and take the account of it. I then went myself, and went around over the whole work and the whole material to verify their estimates; that is to say, of the material that was got out, to within two or three

days. I cannot recollect the number of days of the time we stopped getting out new work. After I took my measurements, there must have been a very considerable amount of material got out. There must have been, because the force at work was very large.

Q. The measures that you then made, have they been preserved, so that you have the original figures?

816 Ans. The original figures have all been given in, I think, but where they are now I don't recollect. I have my own memorandums of the result. Those I have; the original figures, I must have prepared them at very considerable length, but I do not know where they are.

Q. You speak from your own memorandums?

Ans. I speak from my own memorandums.

Q. Where are those memorandums?

Ans. They are at my office.

Q. When were they made?

Ans. I cannot positively tell when they were made. They must have been made at the time I was in possession of the whole original data. I usually finish up those things as soon as possible.

Q. Have you nothing to tell by, when the memorandums now at your office were made?

817 Ans. No, I think not. I think there is nothing to tell when they were made. They were made—they must have been made in the same—well, at the time, about the time, of the close of the work—some time after that, perhaps within two or three weeks.

Q. Do you mean to say positively that they were made within two or three weeks?

Ans. I do not mean to say positively that they were made within two or three weeks, because I cannot carry my mind back to the time when they were made.

Q. Were they not made this litigation was begun—this particular suit in the U. S. circuit court?

Ans. Oh! they were made before that. I am in doubt whether they were made before or about the same time, or after the first suit in the State court was commenced. I cannot tell, but they were made long before this circuit court suit was commenced.

818 Q. You mentioned in giving your account of what had been prepared, that the nails and spikes had not been procured; had any purchase been made?

Ans. Yes; I think they were purchased, but I cannot recollect particularly, and therefore I struck them out of my estimate. I find amongst my memorandums a memorandum of 25,000 pounds of nails and spikes, but I can find no certain account of their having gone on to this work, or their having been left there, and therefore I omitted them in my estimate.

Q. Have you any interest in this controversy now?

Ans. Not the slightest. Not the most remote.

Q. To whom did you transfer your interest?

Ans. I transferred my interest to F. D. Kohler.

Q. When?

819 Ans. I think it is about five years ago, four or five years ago, I cannot recollect now. It strikes me it must be about five years.

Mr. Sharp. We object to that as incompetent and irrelevant, and not within the scope of the decree or order of reference.

GEO. GORDON.

Subscribed and sworn to before me this 27th day of October, A. D. 1864.

HENRY C. HYDE, *Master.*

Hearing adjourned until Monday, October 24, A. D. 1864, at one and a half o'clock p. m.

HENRY C. HYDE, *Master, &c.*

820 MONDAY, *October 24th, A. D.* 1864—one and a half o'clock p. m.

Present: Henry C. Hyde, master, &c.; Cutler McAllister, esq., sol'r for complainant; Edward Tompkins, esq., sol'r for defendants.

On motion of Mr. Tompkins the further hearing of the reference was continued until Wednesday, October 26th, 1864, at eleven o'clock a. m., in order to give him time to produce affidavits for a further continuance.

HENRY C. HYDE, *Master.*

Motion for continuance.

WEDNESDAY, *October 26, A. D.* 1864—five o'clock p. m.

Present: Henry C. Hyde, master; and Solomon Sharp, esq., and Cutler McAllister, esq., sol's for complainant; Edward Tompkins, esq., sol'r for defendants.

821 The hearing having been continued from eleven o'clock this morning until the present time on account of engagements of Mr. Tompkins, the above parties appeared, and Mr. Tompkins, on reading and filing the affidavits of himself and Ralph Reynolds, jr., (marked respectively Ex. 1 and Ex. 2, with my initials,) moved for a continuance of the proceedings for two weeks from this day, to procure the testimony of certain witnesses therein named, on the part of the defence, which motion was argued and submitted to the undersigned, and reserved for decision until to-morrow, at 10 o'clock a. m., to which this reference was adjourned.

HENRY C. HYDE, *Master.*

THURSDAY, *October 27th, A. D.* 1864—ten o'clock a. m.

Present: Henry C. Hyde, master; Solomon Sharp, esq., sol'r
822 for complainant; Edward Tompkins, esq., sol'r for defendants.

The motion to continue the proceedings of this reference for two weeks was denied by the master, and it was ordered that the testimony be closed to-day. Testimony closed.

HENRY C. HYDE,
Master in Equity U. S. Circuit Court, N. Dist., Cal'a.

Affidavit James M. Reynolds.

In the circuit court of the U. S.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL CO. *et al.*

Before Henry C. Hyde, esq., special master.

823 STATE OF CALIFORNIA, *County of Eldorado:*

James M. Reynolds, being first duly sworn, says that he is as adm'r of one of the def'ts in the above-entitled cause, and has an interest, as such, therein; that he is a resident of said county, and habitually abides therein. That the first knowledge affiant obtained of the reference of said cause, as above, was about ten days since; that said cause, prior to said reference, had been argued and submitted to the court, and that said reference took affiant by surprise. Affiant is informed and believes that the plaintiff, upon said reference, examined but one witness, and submitted the cause on behalf of the pl'ff.

Affiant further says that from the great amount involved in said cause, and from the issues of fact made by the pleadings therein,
824 and from the great number of witnesses examined on behalf of the pl'ff on former trials of said cause, he, affiant, believed that the examination of the pl'ff's testimony would require several weeks, during which time def'ts would be able to produce their testimony.

Affiant further says that the def'ts are wholly unable to proceed with the testimony on the part of the defendants at this time, or to have said cause now finally submitted for a hearing by said referee, on account of the absence of testimony and the defendant's inability to procure the attendance of witnesses at this time. That def't has several important witnesses whose testimony is material, who reside in different places, it requiring considerable time to procure their testimony.

That affiant is informed that the only witnesses examined by plaintiff, one George Gordon, the plaintiff in said cause, testified that the def'ts were indebted in said cause in a sum, including interest,
825 greatly exceeding one hundred thousand dollars, which testimony affiant has reason to believe he can contradict by the testimony of credible witnesses, for whose testimony affiant asks for a delay, and thereby greatly reduce the amount thereof. That the names of said witnesses are as follows: Thomas A. Springer, who now resides at Jackson, in Amador county in said State, and Capt. William Smith, who now resides in Carson valley in Nevada Territory. That both of these witnesses were trustees and stockholders of the South Fork Canal Co., and are intimately acquainted with the facts, from their own personal knowledge, upon which pl'ff bases his claim in said cause, and by whom affiant expects to greatly reduce the claim set forth in the testimony of said Gordon.

Affiant further says that he knows of no other witnesses by
826 whom he can prove the same facts aforesaid, which he can prove by said Springer and said Smith.

That since said reference def'ts have been wholly unable to procure their testimony, but that if reasonable delay is permitted, then affiant can and will procure the now absent testimony of said Springer and Smith, and that this affidavit is not made for delay merely, but for the furtherance of justice.

J. M. REYNOLDS.

Subscribed and sworn to before me, a notary public within and for said county, this 24th day October, A. D. 1864.

[SEAL.] W. A. HAMILTON, *Notary Public.*

Indorsed: Filed Oct. 26, 1864.

HENRY C. HYDE, *Master, &c.*

827 *Affidavit Edward Tompkins.*

In the circuit court of the U. S. in and for N. D. of Cal'a.

GEORGE GORDON
v.
THE SOUTH FORK CANAL CO. *et al.*

UNITED STATES OF AMERICA, *Northern district of Cal'a, City and county of San Francisco, ss:*

Edward Tompkins, being sworn, says that the late Judge Baldwin was counsel for def'ts, and had charge of the cause to the time of his death, a few weeks ago. That in consequence of his decease, affiant was about two weeks ago employed as counsel for def'ts, and had no previous knowledge of the case. That the papers necessary to be examined are immensely voluminous, and that the time since affiant was thus employed has not been sufficient to enable him to so far investigate the case as to be able without further delay to do
828 justice to the rights of the def'ts herein. That from the investigation he has made and the information rec'd from his clients, he verily believes that the witnesses named in the affidavit of J. M. Reynolds herewith, are each necessary and important witnesses for the def'ts, and that their rights herein will be greatly prejudiced if this examination should be closed without their testimony. That the reason why the advice of affiant to the def'ts that they cannot safely proceed with and close this examination without the testimony of said witnesses is not stated in said affidavit is because it would delay the application four or five days to write such advice to his client in Eldorado co., and get their affidavit thereof returned here. That, in the opinion of this affiant, at least two weeks will be necessary to procure the testimony of the witnesses mentioned in the affidavit herewith, and that unless it is found that they will come immediately here to be examined, application will be
829 made to the court, without delay, for commissions to take their evidence to use before the master herein.

EDWARD TOMPKINS.

Sworn this 26th day of Oct., 1864, before me.

HENRY C. HYDE, *Master.*

Indorsed: Filed October 26, 1864.
HENRY C. HYDE, *Master, &c.*

Indorsed: Filed this 2 Dec'r, 1864.
GEO. C. GORHAM, *Clerk,*
Pr. W. F. HUESTIS, *D. C.*

830 *Exhibit D. referred to in the report of Henry C. Hyde, master, &c., and made a part thereof.*

U. S. circuit court, north'n dist. of Cal'a.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL CO. *et al.*

Extracts and mem. from testimony in the case.—Depositions.

John Hume, No. 16.
(Nothing pertinent to matters of reference.)

James S. Law, No. 17.

Amount paid to Kinyon on account of his release:

"Kinyon publicly proclaimed in the presence of Dr. Keene, Wm. Smith, and Dr. Harney, "Law and I have consummated the matter, and now I am going up here to get my money," or words to that effect; about 20 minutes or half an hour after that, he came down to
831 my room and counted the money, and then told me that he had the stock transferred to his wife or daughter, I forgot which. The stock he referred to was the stock of the South Fork Canal Company, which was paid to him for making the release. He then counted out $2,000 in money that he had in an old stocking. He then borrowed a mule from me early next morning, and started for Sacramento to go to the States."—Page 9 and 10.

Price of labor:

"At that time (1853) I was paying for common laborers $65 and board, and from that up to $100 and board, they paying their own board during the time they lost. I boarded them Sundays. At that time the contractors lower down were paying less than I did; they were paying from $50 to $60 per month, I think; but I could not get laborers for less wages than I paid. The reason I paid such
832 high wages was that where I was working was a little higher up in the mountains, and more inaccessible for men. Where Gordon was working it was still higher up in the mountains, and still more inaccessible to men."—Page 13 and 14.

Cost of timber:

"I have always made my bids on the ground that when I had got my timber out and got it on the ground I considered the timber work half done. If it cost 10 cents per foot to hew the timber out and get it on the ground, I would be willing to put it up complete for an additional ten cents per foot, including in the last ten cents my profit on the contract, because I consider that it would cost more to get the timber out and on the ground than to put it up."—Page 15.

Cost of grubbing:

833 "I should think it would be worth from $300 to $350 per mile. This depends, however, upon the engineer who has the superintendence of the work. The engineer may cause the contractor to go up high and cut down timber which in his opinion might fall down and destroy the flume; that may cause him to do unnecessary work."—Page 16.

Cost of grading:

"Grading earth, I estimate, would cost 50 cents per cubic yard. Excavating hardpan would cost 80 cents per cubic yard. Excavating rock on that line, on the average, would be worth to the contractor from 4 to 4½ dollars per cubic yard. I make these estimates on cash payments."—Pages 16 and 17.

834 "I don't think it would have cost Gordon and Kinyon to have got out the plank and got it to the line of the grade less than from 65 to 70 dollars per thousand feet, lineal measure." * *

Cost of timber:

"In 1853, 10 by 10 timber, to have got it out and put it along the line of the grade, I consider would have cost from 20 to 25 cents per lineal foot; 5 by 6 timber, such as was used for brace timber, to have got it out and along the grade, would have cost 7 to 8 cents per foot, lineal measure. To get out the sawed timber, posts and caps, would, I think, have cost the same as brace timber."—Page 17.

"The estimates I have made were made on my experience of my own contracts and my own bids. I don't know whether the specifications of the Gordon contract were the same *were the same* as

835 at the time that I bid on them."—P. 28.

Josiah L. Atkinson, No. 18.

Amount paid to Kinyon on account of release:

"I was a director of the South Fork Canal Company, elected, I think, June, 1853."—Page 2.

"I was present when the release made by Kenyon was executed. At the time of the execution of that release, two thousand dollars in money, and three thousand dollars in stock, at the par value, was given to Kinyon in consideration of its execution. Don't remember just now of any other consideration being paid therefor."—Page 4.

Thomas A. Williams, No. 19.

"Am acquainted with the 8 miles at the upper end of the canal, which was their (Gordon and Kinyon's) contract. I worked

836 on that ground for Mr. Kirk, in 1854, part of the time as foreman and part of the time as carpenter. I was one of the first men that went there after Kirk took the contract."—Page 2.

"Amount of grubbing done by Gordon & K.:

"The clearing and grubbing was done all the way through pretty much. Occasionally we would have to grub and clear a little; once in a while we had to, but very seldom."—Page 2.

Amount of grading done:

"The most of the grading was done the whole way through; once in

a while there was a place where Mr. Gordon calculated to put up trestles, that Mr. Kirk graded."—Page 2.

837 Amount of timber got out:

"To the best of my knowledge, there was timber enough got out to put up the whole trestle (work) on the whole line. In trestling, they use 10 inches square of different lengths, and then there were some used for braces in the trestles, 5 by 6 and 5 by 7. There were sills enough got out for the flume when clear through. These sills were 3 by 4. A portion of these sills were framed; part of them were not. These sills were sawed timber. There were some posts got out for the flumes, and some caps; don't know how many; a small portion. Don't think there was enough of the posts or caps for one-quarter of the work. The posts and caps were sawed timber, 3 by 4."—Page 3.

838 Amount of work done generally:

"I remained working under Kirk until he completed his contract. Estimating everything that had been done, I should say that the work had been half completed when Kirk took it.' —Page 3 and 4.

Price of labor:

"The current price of common laborers in the spring and summer of 1853, where I was working at Negro Hill, three miles from Placerville, was from 60 to 100 dollars per month, board included. Up where I was working at that time, it was some trouble for them to get laborers."—Page 4.

Grubbing done by Kirk:

"Don't think Mr. Kirk cleared and grubbed a sixth of this eight miles."—Page 4.

Grading done by Kirk:

"I could not say as to the amount he, Kirk, graded. Think he
839 hardly graded a mile. To the best of my recollection, think he graded from ½ to ¾ of a mile. He did a good deal of blasting on rocks that were in the way, and in making bearings. Page 5. I think Gordon had made a mile of bearings. Could not say how much trestle-work there was up. Mr. Gordon had made bearings to put trestle-work on, in places where Mr. Kirk changed the grade."—Page 6.

Alexander Hunter, No. 20.

(As to rate of interest in 1853, not pertinent to the matters of reference.)

Joseph M. Douglass, No. 21.
(Same as last.)

I Frederick Baker, No. 22, assistant engineer of the South Fork Canal Company, on Gordon and Kinyon's contract, in 1853.—Page 2.

840 Amount of grubbing done by Gordon and K.:

"The first work done by them on the line was grubbing and clearing. I think they grubbed and cleared all the line under contract to them, if not all, very nearly all. I think all * * * *. I can't state positively how much of the whole line they graded. I should

think, however, $\frac{3}{4}$ of it. It was worth more than what Gordon was to get for it to clear and grub that line. My recollection is that he was to get $300 per mile for it."—Page 5.

Cost of grubbing:

"In my opinion, forming a rough estimate, I should say that at the time they stopped work, including the cost of getting started, and everything, Gordon and Kinyon had done between one-third and one half of the whole contract."—Page 6.

841 John C. Johnson, No. 22½.

As to the position of the camps, (tho' not very definite on that point.) The pecuniary condition of Kinyon, grade pegs, and general affairs of the company. (Not pertinent to matters of reference.)

Joseph Hand, No. 23.

"I went, in 1854, to work on the South Fork Canal Company under John Kirk & Co."

Work done by Gordon and K.:

"Work was done upon various portions of the canal, such as grubbing, grading, &c."—Page 2.

Amount of grading done:

"On the 9¾ miles upon which I worked, the grading had all been done. There was a little blasting to be done at various points clearing it off, but the majority had all been done."—P. 2.

Amount of grubbing done:

"I don't think there *there* was any grubbing to be done for that distance; there might have been on 2 miles of it at various
842 points, but I don't think that there was any to be done."—Page 3.

Amount of timber got out:

"I think there was enough 10-in. timber got out and on the line of the canal and below it to have finished the work at the time Kirk went there; I mean above and below the line of the canal. The most of the timber was hauled to the slide. There was little of it to haul."—Page 4.

Amount of plank got out:

"Of the boards for the 9¾ miles, I think there was half of it gotten out when we got there. * * * *

"For this 9¾ miles the majority of the caps, sills, and posts was gotten out at the time we got there, according to the best of of my recollection."—Page 5.

"Of the boards, there was a large quantity on the grade when
843 we got there. One half of the sills, caps, and posts were at the slide and on the grade when we got there."—Page 5.

"The timber and lumber we found there was used by Mr. Kirk in the construction of the canal."—Page 6.

"There were roads made to all the slides."—Page 6.

Charles Binney, No. 24.

(As to fraud in Kinyon's release; not pertinent to matters of reference.)

Chris. C. Batterman, No. 25, (book-keeper and secretary of the company in 1853.—P. 2.

Price of labor:

Being asked the ordinary rate of wages for ordinary laborers, with board, at the time Gordon and Kinyon were working on the contract, he said:

"I should think somewhere from 50 to 70 dollars."—Page 3.

844 Amount paid to Kinyon on ac. of release:

"I think $5,000 was paid Kinyon at the execution of the release, part in money and part in stock; I think $3,000 cash and $2,000 in stock, or else $2,000 cash and $3,000 in stock; will not be positive. The stock was issued in the name of some woman; I think his wife." Page 4.

Joseph W. Taylor, No. 26.

"I worked on the South Fork Canal Company in 1854, under Mr. Kirk. I worked on the upper portion, from Long Cañon to the river. I hauled nearly all the lumber that went down the slides, caps, sills, posts, &c. I had charge of that portion of the work."—Page 2.

845 Amount of grubbing and grading done:

"I have been over the line of that portion. At that time I went there the grubbing had all been done. The grading was pretty much all done."—Page 3.

Amount of timber got out:

"Of the 10-in. timber for the whole work, there was enough out when I got (there.) I did not see any new 10-in. timber; there was an overplus of this timber which we got down the slides to be used in repairs.

"All of the brace timber that we used was out when I got there; pretty much all the sills were out also. There were some new ones got out, but very few.

"I should think there was enough of them piled up at the mill
846 to have finished the work."—Page 4.

Amount of plank got out:

"I should judge that we found there when we got there between 70 and 80,000 feet of plank. I handed them all. I found about 30 or 40,000 feet piled up at the lower end of the railroad, and about the same quantity piled up at the head of the railroad slide."—Page 5.

Roads made:

"It would have been impossible to get this timber through the woods in the first place without constructing roads. These roads were constructed at the time we got there. I saw no new roads made."—Page 5.

Saw-mills built:

"There were two steam saw-mills there when *went* we went
847 there. At the mills there were sets of boring and boxing machines, a mortising machine. There were small circular

saws there. One of these were used by Kirk in carrying on the work."—Pages 5 and 6.

Frederick Baker, No. 27.

Amount of grading done:

"The earth portion of the grade laid out by the engineers for Gordon's grade was pretty much all graded. Some portion of it had to to be finished up, dressed off; was not quite low enough."—Page 3.

John Kirk, No. 28.

"In Feb'y or March, 1854, I entered into a contract with the company for the completion of the upper end of the canal from
848 Long Cañon to the American river."

Extent of the contract work:

"The length of line under this contract was something less than 9 miles."

Materials on the ground used on the canal:

"There was some material on the ground when I went there, which was delivered to me by the president of the South Fork Canal Company, and which I used in the construction of the canal."—Page 2.

Amount of timber:

"Of the materials given to me by the president of the company there was about 60 or 65,000 feet of timber—10-in. timber."

Amount of plank:

"About 300,000 feet of plank, and sills and braces enough for the whole line, some few caps and posts, but very few; don't think
849 there were more than 400 posts. The sills were 3 x 5 timber; the braces were 4-in. plank. This timber and lumber was got out by Gordon the year before, under a contract with the company."—Page 3.

Amount of grubbing done:

"Upon the line of the canal of this contract all the clearing and grubbing had been done by Gordon."—Page 3.

Amount of grading done:

"Most all of the grading had been (done) as they first laid out the canal, except at some hard points the rock was not graded, some short pieces."—Page 3.

Location, &c., of timber:

"The timber was mostly at the slides, that is, the 10-in.
850 and 4-in. timber. A large proportion of it run down the slides, and was lying in the slides. The braces were hewed timber, and at the slides."—Page 4.

"The sills were sawed timber, and were piled up at the mill, and at the head of the railroad slides."—Page 4.

"The plank was piled up, a portion about 200 feet above the level of the canal. Some 30,000 feet piled at the head of the railroad slide.

"Some 40,000 feet out at the mill below Long Cañon, at the lower end of that division."—Pages 4 and 5.

Amount of timber got out:

"There was enough 10-in. timber got out by Gordon and Kinyon, and delivered to me by the president of the company, to com-
851 plete the work. We did not use all the timber; we got out new timber and kept the old dry timber at the slides, and kept it there for repairs."—Page 5.

"I should call 10-in. timber heavy timber, under a contract for heavy timber. I should call braces. caps, sills, and posts light timber."—Page 5.

Cost of timber:

"That (the timber) in the slides would be worth 30 cents per foot; that at the top of the slides would be worth 28 cents; in the woods it would be worth 12 cents."

Amount of timber:

"I should think of this heavy timber there was 35 to 40,000 feet of it in the slides; 10 or 12,000 feet at the top of the slides; some 3 or 4,000 feet in the woods."

Cost of the light timber:

852 "I should say it (the light timber) was worth 10 cents per lineal foot, in the condition in which I found it."—Page 6.

Cost of plank:

"It (the plank) would be worth about $75 per thousand feet, board measure, in the condition which he found it."—Page 6.

Cost of getting out timber:

"From my knowledge of contracting to get out 10-in. timber and put it where I found that timber—left by Gordon in the spring of 1853—that in the slides would be worth 25 cents per foot; that at the top about 28 cents; that in the woods 10 to 12 cents."—Page 7.

"To get out the light timber and place it as I found it, viz., caps, sills, and posts, would be worth 10 cents per foot. The plank would be worth $75 per thousand."—Page 8.

853 Roads made:

"It was necessary to have constructed roads to bring this material to the line of the canal. Such roads had been made by Gordon before my going there; am acquainted with the business of road-making. I saw and used the roads made by Gordon for the purpose of hauling this lumber."

Cost of roads:

"The cost of making such roads in the spring of 1853 was about $500 or $600; not over, I should think."—Page 9.

Cost of saw-mills:

"Gordon and Kinyon had saw-mills for the purpose of sawing this lumber. I am acquainted with the cost of putting up saw-mills at that time.

"There were two mills there, and the cost must have been
854 $20,000; don't think they could have been put there for less, machinery," &c.

Cost of slides:

"The cost of the slides I found at the work, taking railroad and all, must have been about $5,000."—Page 9.

Cost of putting up the flume:

"Taking the whole line of the contract, to put up the entire flume would cost about ¼ of the whole, provided the grading had been already done."—Pages 21 and 22.

Cost of completing Gordon and Kinyon's contract:

"It cost Kirk & Co., or the new company, about $60,000 to complete the Gordon and Kinyon contract."—Page 34.

Henry M. Hewett, No. 29.

"They (Gordon and Kinyon) were engaged upon the work
855 under that (South Fork canal) contract in the spring and summer of 1853.

"I was in the employ of Gordon and Kinyon from about the 15th April, 1853, to the 4th of July, and afterwards went there some time in the fall, and worked for them some 20 days, gathering up their tools, boxing them up, &c. In the spring and summer when I worked for them I was called the superintendent by Mr. Gordon. I measured all the lumber that was put in it, from one end of it to the other."—Page 2.

Amount of grading done:

"The most of the grading on the canal was done by Gordon and Kinyon; however, some spots were graded after they quit work on it by Kirk."—Page 3.

Amount of timber got out:

"There was 10-in. square timber enough got out by these
856 contractors to finish that portion of the canal; that is, the upper 8 miles, which they contracted to make.

"There was also brace timber enough to finish it."—Page 3.

"There was also timber enough sawed for the entire cross-sills of the ditch for the 8 miles. There were a few posts, not a great many, got out. Can't tell for what distance they were sufficient. For caps there was considerable many, perhaps sufficient for two or three miles. There was no other species of timber except planking for the flume got out. * * * Am a contractor. * * * Of the species of timber that I have mentioned the trestle-work and long sills would be called heavy timber; the short sills would be called light timber. Sills, posts, and caps and stringers may be called heavy timber. All
the heavy and brace timber for the 8 miles was got out. The
857 small cross-sills and caps over the flume, and posts, would be called light timber, also the braces. I believe the prices would all be the same."—Page 4.

"The light timber was sawed timber, and was not all got out. All the cross-sills were got out, and part of the caps and posts were got out. * * * I am not, positive with regard to the 10-in. timber, but think there was from 70 to 72,000 feet.

"This was the heaviest timber that we used in the construction of the flumes. There was somewhere between 9 and 11,000 feet of timber that we got out for brace timber."—Page 5.

Amount of plank:

"Don't know for certain how much plank there was, but to the best of my knowledge there was about 350,000 feet of plank."—Page 6.

Amount of grubbing done:

858 "I think the whole of the 8 miles of clearing and grubbing was done. I travelled over it a great many times, and know that the way was all clear."—Page 6.

Railroads made, described:

"There was a double track railway made, and cars placed on it. The railway was about 1750 feet. * * * * *

"The railroad was composed of cross-ties and longitudinal rails; the centre rail was wide enough for two cars to pass each other on the same rail; it was constructed of wood.

"Wages were higher then than they are now.

"There were some iron work and castings about the cars, which were brought up from San Francisco. There was considerable work required to make the cars.

"There was another railroad which ran from the saw-mill and

859 met the first railroad, which was on an inclined plane. The distance of this second railroad from the mill was 200 yards—it might be more or less. These were the only railroads."

Other roads:

"There were roads made through the woods in every direction for hauling logs and timber."—Pages 7 and 8.

Saw-mills:

"The contractors also erected two good saw-mills, with tools and everything necessary for carrying on the work."—Page 8.

Number of men employed:

"During the time I was there, the largest number of men that was employed on the work at one time was between 190 and 200 men; when I first got there there was from 100 to 130 men employed; they increased the number of men as fast as they could." * * *

860 Price of labor:

"There was various prices paid to the men, three of us received $150 per month and board.

"The men who were cutting wood with me as choppers, (and they were about 40 in number,) received $60 a month and board. The head engineer received one hundred and twenty-five dollars per month and board. Don't know what the other four engineers got. I think $100 per month and board. The rest of the men got $50 per month and board."—Pages 8 and 9.

Cost of timber:

"I have some knowledge of what that 10 by 10 in. timber was worth at that time; I suppose it was worth about 10 cents per foot.

861 That was what he paid for it, and he got it done as cheaply as it could be done."—Page 10.

"Some of the brace timber was got out by contract. Gordon paid for part of 4½ cts. per foot, and for part of it 5 cts. per foot." Page 11.

Cost of lumber:

"I know of Gordon's paying between $50 and $60 per thousand for lumber at the mills where it was sawed, and they had to haul it to the grade."—Page 11.

"At that time it was an awful rough country."—Page 12.

Cost of timber:

"The estimate that I put on the 10 by 10 timber yesterday was what it Gordon & Kinyon to get it out at the stump in the woods, they furnishing the axes."—Page 16.

Amount of timber:

"We got out of this kind of timber (10 by 10) about 70 or
862 72,000 feet; 8,000 feet of this timber were left in the roads; the rest of this timber was hauled to the slides, and some of it taken down. I remember of 12,000 feet of it being run down slide No. 3."—Page 16.

"Of this timber, I suppose there was about ⅔ of it slid down the hill."—Page 17.

Situation of the lumber:

"This lumber was taken on the rail cars and run down on them, and at the time the men stopped work part of it was at the mill, part of it where the railways met, and part of it at the lower end of the railways down the hill."—Page 18.

Quantity of same:

"Some of the lumber was at a mill near the mouth of Long Cañon, at the lower end of the work."

"At this mill at the mouth of Long Cañon there was between
863 24,000 and 30,000 feet of lumber, to the best of my knowledge. I measured it all, but it is now some 6 years ago, and I can't recollect perfectly."—Page 18.

"There being four different places at which the lumber was piled, I can hardly say how much there was at each place; my opinion is, however, that there was about 200,000 feet of lumber at the lower end of the lower railway—that is, the railway on the inclined plane.

"There was a big pile of lumber at the junction of two railways; can hardly say how much there was there. There was 300,000 feet of lumber in all.

"There was not quite ⅔ of it down from the saw-mill.

"There was only a small portion of the plank left at the mill; from 5 to 10,000 feet of it. The balance of it that was not down, was at the junction of the railways."—Page 19.

864 Timber used in the flume by Kirk:

"All the timber left by Gordon & Kinyon at the time the men stopped work was taken and put into the flume, except the surplus that I spoke of yesterday."—Page 20.

"Mr. Kirk used it, and it was delivered up to him by Dr. O. Harney. I believe he was one of the directors of the company. I was foreman of Mr. Kirk."

Timber, &c. appropriated by the company:

"Dr. Harney told me in 1854, at this time, that the timber was the property of the South Fork Canal Company, that they had bought it, and that I must use it as foreman of Mr. Kirk, who was carrying on the work for them. I understood that Dr. Harney was at that time one of the directors of the South Fork Canal Company. The timber was taken and used by the authority given by Dr. Harney to Mr. Kirk."—Page 21.

Amount of grubbing done:

"I think the grubbing and clearing was all done by Gordon
865 & Kinyon with the exception of a few trees which I cut away for fear they might fall across the ditch."—Page 23.

Amount of grading done:

"To the best of my opinion Gordon & Kinyon graded over ⅞ths of the whole 8 miles of this work."—P. 23.

Slides:

"Kirk did not make any new slides that I know of."—Page 24.

"I don't think that I put in the estimates of timber heretofore made by me in this examination the timber, that is the small timber, used in this trestle-work, but I have estimated the 10 in. timber and planking which was used in it."—P. 34.

866 Contract half completed; cost of completing same:

"At the time the men left, Mr. Gordon had the contract half completed, because I am well satisfied that Mr. Kirk completed it with less than the amount of money that Mr. Gordon had expended on it." P. 35.

Obed Harney, No. 30, (a director of the company; testimony as to grade pegs, work done, Kenyon's release, &c.; payment about the 1st of June, '53, of $4,000.)

Material left by Gordon; delivered to Kirk by the co.:

"Some time in June, 1854, the completion of this canal from Long Ca on up was given to Mr. Kirk. The lumber then about the mills was conveyed and delivered to Kirk by the company. I went up on the line, and, as president of the company, I delivered this lumber and timber to him."—Pages 8 and 9.

Amount paid to Kinyon on a'c of release:

"Further negotiations were carried on between the company and Kinyon, which resulted in the settlement by the company paying
867 him $5,000; $2,000 cash, and $3,000 in the stock of the company. The parties gave mutual releases in writing."—Page 13.

Value of the stock at date of Kinyon's release:

"Do not remember the exact date, but the release (from Kinyon was delivered about 25th or 28th June. The stock of the company had some value at that time; at or about time think it had been selling at 75 cents on the dollar."—Page 29.

Albert T. Taylor, No. 31, secretary of the company at the time of

contract with Gordon and Kinyon; testimony principally as to Kinyon's release, and differences with Gordon.

Payments made to Gordon:

"There was a payment amounting to about $4,000 made upon it, (the second estimate and last one.)"—Page 11. "Don't remember the amount of the first estimate. It was paid when it was due."—Page 16.

William H. Smith, No. 32.

868 Amount paid to Kinyon on a'c release:

"They (the board) offered to give $2,000 cash and $3,000 in stock, and relinquish the bond, which offer was accepted by Kinyon (referring to Kinyon release.)"—Page 6.

George R. Turner, No. 33, (first assistant engineer under A. J. Binney, chief engineer; testimony principally as to grade pegs. Not pertinent to matters of reference.)

A. J. Binney, No. 34, (chief engineer of the company at the time of Gordon contract.)

Preparatory work done by Gordon:

"There was a good deal of work done by Mr. Gordon preparatory to the work on the canal, such as constructing saw-mills; he built two, making slides down the bank for the running down of the sawed
869 timber from the mills, making roads, &c. These things did not enter into my estimate."

Necessity of same:

"This work was judicious, and to some extent necessary."—Page 14.

George Gordon:

The testimony of this witness was taken before the master, and is not quoted here for the reason that the whole of it concerns the matters of the reference, and is filed with the master's report.

The application of the labor and materials, referred to throughout the testimony, to the sections seventeen to twenty-five, inclusive, of the South Fork canal is not disputed.

870 As to the payments to Gordon and Kinyon on account of the contract, Gordon testifies that he received altogether $6,200, but does not give the dates of any of the payments. The other testimony shows a payment of "about $4,000" on the second and last estimate under the contract, on or about the 1st of June.

The bill avers a payment of "about 4,300" on the said second estimate.

The answer avers a payment of $4,000 on account of said second estimate, between the 1st and 5th of June, 1853. It is admitted that the first estimate was paid about the first of May, same year, but the amount is not stated.

In fixing the dates of the payment of the $6,200, the master
871 concludes that $2,200 was paid May 1st, 1853, and $4,000 was paid on the 1st of June, 1853.

San Francisco, November 30th, 1864.

HENRY C. HYDE, *Master, &c.,*
U. S. Cir. C't, North Dist., Cal'a.

Indorsed: Filed this 2d Dec'r, 1864.

GEO. C. GORHAM, *Clerk*,
Pr. W. F. HUESTIS, *D. C.*

872 *Notice.*

In the circuit court of the northern district of California.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL COMPANY.

To Messrs. J. B. Haggin and Edward Tompkins, solicitors for def'ts:

GENTLEMEN: You will please take notice that the report of Henry C. Hyde, master specially appointed herein, has this day been filed in the clerk's office of said circuit court.

San Francisco, Dec'r 2, 1864.

Yours, &c.,
SOL. A. SHARP,
Sol. for Complainant.

Indorsed: Due service of a true copy of the within notice hereby admitted this 3d day of December, A. D. 1864.

EDWARD TOMPKINS,
Sol. for Def'ts.

Filed Dec. 5, 1864.

GEO. C. GORHAM, *Clerk*,
Pr. W. F. HUESTIS, *Dep'ty.*

873 *Order.*

Circuit court of the United States, northern district of California.

GEORGE GORDON.
vs.
THE SOUTH FORK CANAL Co. *et al.* } Equity.

And now at this day, it appearing to the court that the report of Henry C. Hyde, master specially appointed herein, was duly returned and filed in this cause on the 2d day of December, A. D. 1864, and that the solicitors of defendants were duly notified to the filing thereof, and that no exceptions to said report have been filed, and that more than one month has elapsed from the filing of said report—

On motion of the solicitors of complainant it is ordered that said report be, and the same is hereby, confirmed. A decree to be drawn up and submitted to the court. A true and correct transcript of the proceedings had and order made in said cause, February 6th,
874 1865, at the regular February term of the said circuit court.

HOFFMAN, *J., Presiding.*

Attest: GEO. C. GORHAM, *Clerk.*

Minutes.

Circuit court of the United States, northern dist. of California, in equity.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO.

And now at this day, this cause having been set for to-day, came on for final hearing upon the pleadings, process, proofs, orders, exhibits, and master's report thereon, and was duly argued by Sol. Sharp, esq., for complainant, and Edward Tompkins, esq'r., for defendants, and was thereupon submitted to the court and taken under advisement.

875 A true transcript of proceedings had in said cause June 15, A. D. 1865, at the regular June term of said circuit court.

Attest: GEORGE C. GORHAM, *Clerk*,
P'r W. F. HUESTIS, *Deputy Clerk.*

Minutes.

Circuit court of the United States for the northern district of California, in equity.

GEORGE GORDON
vs.
SOUTH FORK CANAL CO.

And now the court files its opinion herein, and directs that a decree be prepared in accordance therewith.

A true transcript of proceedings had in said cause September 4th, A. D. 1865, at the regular June term of said circuit court.

Attest: GEO. C. GORHAM, *Clerk.*

876 *Opinion.*

Circuit court of the United States, northern district of California.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL COMPANY.

By the interlocutory decree rendered at the October term, it was adjudged that the demand of the complainants for the work performed and materials furnished in the construction of the canal of the defendants, from section seventeen to section twenty-five, inclusive, under the contract of March 16, 1853, was, to the extent of reasonable value, a lien upon the portion of the canal constructed paramount to all other liens set forth in the pleadings, and it was referred to a master to take and state an account of the value of such work and materials, and to ascertain the amount paid to the com-
877 plainant, and report the same to the court.

The master was also directed to compute the amount of interest due on the estimated value of the work and materials, from June 13th, 1853, to the date of the computation, at the rate of ten per cent. per annum.

In December last the master made his report, and no exceptions being taken to it by any of the parties, it was confirmed under the eighty-third equity rule of the court.

The master found the value of the work bestowed and the materials furnished in the construction of the canal, from section seventeen to section twenty-five, inclusive, to be $76,598 89, and the amount paid to the complainant upon the contract to be $6,200, and the computed interest due on these sums up to November 30, 1862, . The master also found the value of what he termed preliminary work and
878 materials, that is, for work done and materials furnished in preparation for the construction of the canal, such as the building of saw-mills, railroads, inclined planes, blacksmith shops, charcoal pits, hoisting and lowering apparatus, and the like; but the demand for work and materials of this character is not a lien upon the canal. The lien given by the law is intended for the security of the work actually performed upon, and the materials which enter into the thing constructed, and of no other. The expense of machinery and tools used are the proper subjects of inquiry by laborers and contractors in fixing a charge for their work, but do not constitute distinct items for consideration in addition to the work itself, in determining the amount for which a lien should attach upon any particular structure.

879 The lien will therefore be only allowed for the amount of $76,598 89, and interest thereon from June 13th, 1853, after deducting the sums paid to the complainant, with interest.

The more important question for determination is whether the lien shall be declared to extend upon the entire line of the canal, and be enforced against the whole, or be declared to exist upon the sections actually constructed under the contract, and be enforced only against that portion.

In the interlocutory decree a lien was only declared to exist upon the sections named. Our attention in considering the case has been especially directed to the question of the existence of any lien, and little had been said by counsel on either side as to the extent of the canal upon which the lien, if declared, would attach. Upon the final hearing our attention has been particularly called to this
880 matter, and, from the reading of the statute, we are satisfied that we erred in limiting the lien to the particular sections named. The canal is to be regarded as an entire thing, as a building is to be regarded to which additions or repairs are made. The lien is obviously not restricted to the wing added, or to the chamber or roof repaired, but extends to the whole structure. The statute of April 12, 1850, provides that "All master-builders, mechanics, lumber merchants, and all other persons performing labor or furnishing materials for the construction or repairs of any building or wharf shall have a lien, separately or jointly, upon the building or build-

ings, or wharf, which they may have constructed or repaired, or for which they may have furnished materials of any description,
881 to the extent of the labor done or materials furnished, or both." (Laws of 1850, chap. 87, sec. 1.)

And the statute of May 17, 1853, declares that the previous act of 1850 "shall be so extended as to include in its provisions bridges, ditches, flumes, or aqueducts constructed to create hydraulic power or for mining purposes; and all master-builders, mechanics, contractors, journeymen, or laborers, and all other persons performing labor or furnishing materials for or employed in the construction or repair of any bridge, ditch, flume, or aqueduct aforesaid, shall have the same lien, subject to the same provisions and regulations as in and by said act is provided for liens upon buildings and wharves." (Laws of 1853, chap. 148, sec. 1.)

As will be perceived by this last act the lien is given upon
882 the bridge, ditch, flume, or aqueduct, that is, upon the whole of each work, not upon a part of either, where labor is performed or materials are furnished for or employed in their construction or repair.

It is not essential to create the lien that the labor or materials should cover the entire work; the lien goes upon the whole for the construction or the repair of any portion.

The statute leaves no room for doubt on the question presented, but determines it in favor of the complainant.

And there is nothing in the adjudication of the interlocutory decree which prevents the extension of the lien on the final hearing. A court of equity can, at such hearing or at any time before, enlarge or restrict, or otherwise modify, the provisions of its interlocutory
883 orders or decrees, either upon the petition of the parties, or upon its own further consideration of the law and the evidence; the whole case is under its control until the final decree is rendered. (Calk & Arear *vs.* Stribling, 1 Bibb, 12; Cook's Heirs and Creditors *vs.* Bay, 4 How. Miss., 485.)

A decree will be entered extending the lien, and directing a sale of the entire canal, and the application of the proceeds to the payment of the demand of the complainant as stated in this opinion.

FIELD, *J.*

I, George C. Gorham, clerk of said court, do hereby certify that the foregoing is a full, true, and correct copy of the original opinion filed in the above-entitled cause, on the 4th day of Sept., 1865.

GEO. C. GORHAM, *Clerk*,
By W. F. HUESTIS, *Dep. Clerk.*

884 *Decree.*

In the circuit court of the United States, northern district of California, June term, A. D. 1865, in equity

GEORGE GORDON, complainant,
vs.
THE SOUTH FORK CANAL COMPANY *et al.*, defendants.

This cause came on to be further heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed as follows, namely:

That there is justly due from the South Fork Canal Company to the plaintiff, George Gordon, the sum of one hundred and
885 fifty-one thousand and sixty-four $\frac{21}{100}$ (151,064 21) dollars, on account of work and labor performed upon and materials furnished and used in the construction of the flume and canal of said company, situated in the county of Eldorado, in said district, with interest thereon at the rate of ten per centum per annum from the thirtieth day of November, eighteen hundred and sixty-four; and the same is hereby declared to be a valid lien upon said flume and canal, with the appurtenances thereof, and to be paramount to any and all other liens or charges thereon, real or pretended, set forth or mentioned in the pleadings.

It is further ordered, adjudged, and decreed that said South Fork Canal Company pay to said plaintiff, or his solicitor, said sum of money, with interest thereon, as aforesaid, and the costs of this
886 suit to be taxed, on or before the ninth day of October, eighteen hundred and sixty-five, and in default thereof that said flume and canal, with the appurtenances, be sold at public auction (for cash) to the highest bidder, by Henry C. Hyde, who is hereby appointed a master of this court for that purpose; that said sale be made in front of the court-house in the city or town of Placerville, in said county of Eldorado, between the hours of eleven a. m. and two p. m., and upon the following terms, to wit: ten per cent. of the sum bid shall be paid in cash to the said master at the time of the sale, (unless the plaintiff himself became purchaser,) and the balance shall be paid upon the confirmation of the master's report of sale.
887 Previous notice of the time and place and terms of said sale shall be given, by posting the same in three public places in said county for a period not less than twenty days, and by publication thereof at least once a week for three consecutive weeks in some newspaper published in said county; that said master receive from the purchaser or purchasers at least ten per cent. in cash of the sum or sums bid, with a written promise for the payment of the residue according to the terms of the sale, and that he bring the same into this court, together with his report of what he shall have done in the premises, which he is hereby directed to make with all convenient speed. In case the plaintiff shall become purchaser at such
888 sale, the master is authorized and directed to take his receipt

for the amount bid, less the costs of the sale and of this suit, and any excess beyond the amount of the plaintiff's demand, and lodge the same with his report of sale.

It is further ordered, adjudged, and decreed that in case the purchaser or purchasers shall fail to comply with the terms of the sale as herein directed, the bid shall be forfeited, and the said master, in such case, is authorized and directed so to pronounce, and to again expose the property to sale; and for the purpose of successfully conducting such sale, he is authorized to adjourn the same, if necessary, from day to day.

It is further ordered, adjudged, and decreed that upon con-
889 firmation of the report of the sale and payment of the balance of the purchase-money due on such sale bid by the purchaser, the said master proceed to apply the proceeds of such sale: first, in discharge of the costs incident to said sale and the costs of this suit; second, in payment and discharge of the plaintiff's demand, with interest thereon, as aforesaid; the balance, if any, he shall deposit in this court subject to its further order; also, that he make and deliver to the purchaser or purchasers a good and sufficient deed of conveyance of the property sold, and that the purchaser or purchasers be thereupon let into possession thereof; and in the mean time that the defendants be hereby restrained from commit-
890 ting or permitting any acts of spoliation or waste injurious to said property, or tending to diminish its value.

Ordered, adjudged, and decreed this 8th day of September, 1865, (eighteen hundred and sixty-five.)

STEPHEN J. FIELD,
Associate Justice of the U. S. Supreme Court and Judge of Circuit Court, Tenth Circuit.

Decree entered September 11, 1865.

GEO. C. GORHAM, *Clerk.*

Costs taxed at three hundred and seventy-three 88-100 dollars.
San Francisco, Sept. 11, 1865.

GEO. C. GORHAM, *Clerk.*

Indorsed: Filed Sept. 8th, 1865.

GEO. C. GORHAM, *Clerk.*

891 *Order granting appeal.*

In the circuit court of the United States for the northern district of California, in equity.

GEORGE GORDON, complainant,
vs.
THE SOUTH FORK CANAL COMPANY *et al.*, defendants.

Come now the said defendants, by Tompkins and Crane, their attorneys, and pray an appeal to the Supreme Court of the United States from the final decree entered herein on the 8th day of September, A. D. 1865, and such appeal is granted accordingly, upon

bond being given and filed herein on behalf of said defendants, in the penal sum of three hundred dollars, conditioned for the prosecution of said appeal to effect, and answer all costs if they shall fail to make good their plea; said bond to be approved by a judge of this court.

FLETCHER M. HAIGHT.

Indorsed: Filed Oct. 16, 1865.

GEO. C. GORHAM, *Clerk.*

Entered in open court Oct. 16, 1865.

GEO. C. GORHAM, *Clerk.*

894 *Bond.*

In the circuit court of the United States, the northern district of California, in equity.

GEORGE GORDON, complainant,
vs.
THE SOUTH FORK CANAL COMPANY, defendants.

Know all men by these presents, that we, Joseph M. Douglass, Geo. W. Swan, and A. C. Henry are held and firmly bound unto the abovenamed George Gordon, in the sum of three hundred dollars, to be paid to the said George Gordon, his executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this seventh day of October, in the year of our Lord one thousand eight hundred and sixty-five.

Whereas the defendants above named have prosecuted an appeal to the Supreme Court of the United States to revise the decree therein rendered by the said circut court of the United States for the northern district of California, at the June term thereof, A.
895 D. 1865, decree rendered September 8, and entered of record September 11, 1865:

Now, therefore, the condition of this obligation is such that if the said defendants shall prosecute their said appeal to effect, and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

G. W. SWAN. [L. S.]

Sealed and delivered in the presence of—
A. C. HENRY. [L. S.]
J. M. DOUGLASS. [L. S.]

STATE OF CALIFORNIA, *Northern district, Eldorado county:*

Joseph M. Douglass, Geo. W. Swan, and A. C. Henry, being duly sworn, each for himself says that he is a resident householder and freeholder within the county and State aforesaid, and that he is worth double the amount specified in the foregoing bond as the

penalty thereof, over and above all his just debts, and exclusive of property exempt from execution.

G. W. SWAN.
A. C. HENRY.
J. M. DOUGLASS.

Subscribed and sworn to before me this seventeenth day of October, A. D. 1865.

S. W. SANDERSON,
Chief Justice Supreme Court, California.

The within bond approved by me this 1st day of November, 1865.

F. M. HAIGHT,
n e of the Judges of the said U. S. Circuit Court for the Northern District of California.

Indorsed: Filed Nov. 1, 1865.

GEO. C. GORHAM, *Clerk*,
By W. F. HUESTIS, *Dep. Clerk.*

896 CLERK'S OFFICE, CIRCUIT COURT,
Northern district of California, ss:

I, George C. Gorham, clerk of the circuit court of the United States, northern district of California, do hereby certify that the foregoing eight hundred and ninety-five pages constitute a full, true, and correct copy of the record, including the pleadings, process, proofs, orders, and decrees, and the proceedings to perfect appeal had in cause of George Gordon *vs.* The South Fork Canal Company *et al.*

Witness my hand and the seal of said circuit court this twelfth day of December, A. D. 1865.

GEO. C. GORHAM, *Clerk*,
By DAN'L T. SULLIVAN, *Deputy.*

897 UNITED STATES OF AMERICA:

To George Gordon, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to an appeal taken on the part of defendants, and granted by the circuit court of the United States for the northern district of California, by order to that effect entered in open court in said court on the 16th day of October, A. D. 1865, from a final decree rendered in said court on the 8th day of September, A. D. 1865, in a suit in equity, wherein you, the said George Gordon, are complainant, and the South Fork Canal Company and others are defendants, to show cause, if any there be, why the said decree should not be corrected and speedy justice done to the parties in that behalf.

Witness the honorable Solmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 13th day of November, A. D. 1865.

FLETCHER M. HAIGHT,
Judge of the District Court of the Southern District of California, and now acting as Judge of said Circuit Court, under the authority of the act of Congress.

Attest: GEO. C. GORHAM,
Clerk U. S. Cir. C't, Nor. Dist. of Cal'a,
[SEAL.] By W. F. HUESTIS, *Dep. Cl'k.*
[50 ct. rev. stamp.]

898 NORTHERN DISTRICT OF CALIFORNIA,
City and county of San Francisco, ss:

W. C. Tompkins, being duly sworn, says that he is a white male citizen of the United States; over the age of twenty-one years; in no way interested in the foregoing cause, and capable of being a witness therein; that on the 13th day of November, 1865, he served the within citation on Solomon A. Sharp, solicitor for within-named George Gordon, complain't, by handing to him personally, at the said city and county of San Francisco, a true copy thereof, at the same time showing and exhibiting to him this original.

Subscribed and sworn to this day of Nov'r, 1865, before me.
WILLIAM C. TOMPKINS.

Subscribed and sworn to before me this 18th day of December, 1865.

DAN'L T. SULLIVAN, *U. S. Com'r.*

Filed January 16, 1866.

No. _____

IN THE

SUPREME COURT

OF THE UNITED STATES.

THE SOUTH FORK CANAL COMPANY et al.

APPELLANTS,

VERSUS

GEORGE GORDON.

APPELLEE.

BRIEF OF APPELLEE,

WITH

Opinions of Hon. Hall McAllister, late Judge of the Circuit Court, and Justice Field.

Delos Lake (aut)

SOL. A. SHARP,

OF COUNSEL FOR APPELLEE.

SAN FRANCISCO:

[illegible] & COMMERCE STS

IN THE SUPREME COURT

OF THE UNITED STATES.

THE SOUTH FORK CANAL COMPANY ET AL.,
Appellants,
vs.
GEORGE GORDON,
Appellee.

This is an appeal from the decree of the Circuit Court of the United States, for the District of California.

On the 16th of March, 1853, the appellee and one Kinyon contracted with the South Fork Canal Company for the construction of their Canal, the work to be completed by the 1st of July, 1853. The commencement of the work was delayed by non-action of the Company's Engineer, but the contractors embarked in the work with great energy. The contract called for monthly estimates and payments, and on the 1st of May the first estimate was made and paid; on

the first of June another estimate should have been made, but it was delayed until the 6th, and then a partial estimate was made of only $26,000. Of this amount the Company were only able on the 7th of June to pay $4,000.

By the failure on the part of the Company, the contractors were unable to pay hands, and finding the Company were unable to progress, it being without money or credit, the contractors, who had expended and become liable for about $100,000 in the prosecution of the contract, were compelled to abandon the contract. On the 21st of June they filed their notice of lien in pursuance of the Statutes of the State, claiming a lien on the said Canal at that time, amounting to the sum of $106,418 for work, labor and materials. On the 7th day of July, a farther notice of lien was filed.

The action was commenced June 12th, 1864, by the appellee to recover the amount due for work, labor, material and damage and to foreclose the lien held by the appellee on the Canal of the Company. The decree was made and entered on the eighth day of September, 1865, adjudging the appellee entitled to the sum of $131,061.21 with costs, establishing and extending the lien, and directing a sale of the entire Canal, and the application of the proceeds to the payment of the said sum of money.

The points made by the appellants in the Court below are as follows :

1st. That the appellee and Kinyon cannot recover, for the reason that they failed to perform their undertaking within the time specified, and that if they were prevented from prosecuting their work by the neglect of the Company, they should have ceased work upon the first discovery of such neglect.

2d. That the Company was discharged from any and all obligations in the premises by the release from Kinyon.

3d. That it was physically impossible for the contractors to perform a work of such magnitude within the time specified, even if the Company had in all things complied with the undertaking on their part.

4th. That the statute for the lien of mechanics and others has no application to a canal.

5th. That if the law applies to a canal, the appellee is limited in his lien by the interlocutory decree, entered Oct. 13th, 1864, that the same cannot be extended by the final decree, and that the lien is invalid for the reason that this action was not commenced within one year from the discontinuance of the work.

6th. That when the appellee and Kinyon abandoned the contract the Company had funds to pay the amount due on the estimate then made,

that time is not an element of the contract, and that it cannot be apportioned.

Anticipating that the position of the appellants will be the same in this Court as in the Court below, it is proposed to consider their points *seriatim*.

I.

The appellee and Kinyon were in law excusable in failing to perform their undertaking within the time specified, because of the neglect of the South Fork Canal Company to fulfill the various stipulations in the agreement contained on their part, in a number of particulars, and the fact of their not abandoning the contract upon the first neglect of the Company does not affect their right of abandonment.

First. The Company neglected to furnish grades and levels in such manner as to enable the contractors to employ their men to work to the best advantage, and thus they retarded the progress of the work.

The statement that a line of grade pegs had been set along the whole length of the contemplated Canal, is nothing to the purpose.

These pegs were set from thirty-three to sixty-six feet apart, and were merely intended to indicate the route of the Canal as first surveyed; so as to enable the contractors to go on with clearing and grading.

A double line of pegs (at short distances) was

essential to the further performance of the work.

It will be seen by reference to the testimony, that the contractors were frequently delayed for want of the proper grades and levels, and that in fact, there was a wanton neglect on the part of the Engineer, who was under the control of the Company, to furnish these at the required points along the line, as demanded by the contractors. The camps of the workmen were located about midway between the termini of the line, so that the work might progress either way from that point, at the same time; it was the only plan of operation that promised success, and the Engineer should have conformed to it; instead, however, of attempting to facilitate the rapid advancement of the work, the Engineer manifested a culpable indifference to the wishes, convenience and necessities of the contractors.

TESTIMONY.

C. C. BATTERMAN "was book-keeper of the S. F. Canal Company when the contract was made; and became Secretary thereof, in May or June, 1853.

"After the contract was let to Gordon and Kinyon, I think, they demanded grades and levels from the Company."

(Trans. fol. 491.)

ON CROSS-EXAMINATION.

"In speaking of Gordon and Kinyon demanding grades, I mean they wrote a letter to the Company requesting grades and levels. (Fol. 194.)

HENRY M. HEWETT, was in the employ of Gordon and Kinyon, superintending the work. "*Where Gordon had his camps, the Engineer of the Company had placed no grade pegs*, and there was a good deal of growling and grumbling. I went and told the Engineer of the Company about it, and he told me there was plenty set below, to set the men at work there, and something of the kind. I think this want of grade pegs occurred about the first of May. *I know they had a great many men at work, and wanted grade pegs.*"

"The difficulty of not having grade pegs by the Company is that they would have to move their camps to go and work where the grade pegs were set, instead of working on continuously. It is necessary to have small camps, and a great number of them, in order to push a work forward rapidly, and grade pegs are necessary at all of our camps.

"Grade pegs are necessary, to know the level upon which the flume is to be put."

"I recollect of Kinyon, one of the contractors, complaining to the engineers of the Company, Turner and Birney, at different times, of the want of grade pegs, and quarreling about it."

"At that time Birney was Chief Engineer and

Turner was assistant Engineer of the S. F. Canal Company." (Fols. 557, 558.)

FRED. BAKER.—"Was employed by S. F. Canal Company in capacity of Assistant Engineer."

"I was on the line acting as Assistant Engineer all the time they were at work."

"*I know that there was a good deal of complaint made by Gordon, and his men could not go on with the work for want of grade pegs.*"

"*Can't state the precise date. The Engineer went up there in February, and commenced at the lower part of the line and worked up.*"

"*Gordon complained that they were waiting above for grade pegs, that he could not go on with their works, and blamed the Engineer for not having them ready.* This was after he came up; can't recollect the precise time."

"He made complaint sometimes to me, sometimes to Turner, sometimes to Birney, who was up there occasionally. Birney was Chief Engineer, Turner had charge of the level, and I was with him. *When Gordon made the demand for grade pegs, we told him we would get up where his men were as soon as we could.*"

"*Don't remember how long after the demand was made by Gordon it was that we got up to where the men were working.* We commenced at the lower end and *Gordon commenced in the middle of the line.*"

"*Gordon asked us frequently to put grade pegs in different places, that he wanted to put gangs of men to work at different places, and had no grade pegs.*"

"*I think we finished setting grade pegs about the first of June.*" * * * *

"*When Gordon demanded grade pegs the Engineer of the Company did not go to the points where he wanted them and fix the grade for him, he had to wait until they got there.*"

"The engineering party commenced at the lower end and traveled up continuously, fixing the grades to the upper end."

"*We set the grade pegs, on an average, one quarter of a mile a day, it might be more, as it is so long ago I have forgotten.* We worked from the time we started continuously setting grade pegs, *and don't think we got through setting until the first of June.*"

"When we went over it *the first time, we only set one line of grade pegs.* After the work is graded there has to be another line set." (Fols. 448, 449, 450, 452, 453.)

CROSS-EXAMINED.

"*Don't think that while Gordon and Kinyon were at work, there were enough grade pegs set to employ their men advantageously;* but there were enough set to have occupied all their men." * *

"We commenced to set the grade pegs before it was grubbed and cleared, that is what took us so long; it was very bad ground to get over, very

brushy, etc. Gordon had not got up there when we commenced. We were at work continuously after we commenced setting grade pegs. We were from the last of February to the 1st of May setting eight miles of grade pegs." * *

"Don't remember how many times Gordon sent for grade pegs. He wanted them above, and we told him we could not skip over, but would be there as soon as possible. There were plenty of grade pegs set below."

RE-EXAMINED.

"Had Gordon and Kinyon set their men at the grade pegs below, *they could have worked all their men, but not to advantage; it would take them all day to get to their camps and back again.*"

"I believe there were men at work at the line below where we set grade pegs; some clearing and grubbing; and some grading: how many (grubbing) I don't know.

"*It is necessary to commence the work at various points* with small gangs of men to push it rapidly forward. It was very difficult getting over the line."

"His saw mills were situated a little above the middle of the line; and just below that, on the grade, he made his headquarters. (Fols. 454, 455, 456, 457.)

JOHN J. JOHNSON.—"At the request of Mr. Gordon I went along to the upper portion of the

line, in fact I am not certain but I went through; at any rate I went over nearly the whole line in the contract. This was about the time of the difficulties between Kinyon and the Company.

"Mr. Gordon requested me to go over the line and see if the grade pegs were set. This was somewhere between two months and ten days before the work was suspended; this was during some dispute between the contractors and the Company, which arose out of claims that Gordon said he had for estimation; which he claimed and the Company refused to pay. Some other gentleman was requested to go, and who did accompany me, but I have forgotten who he was."

"*The lower portion of the line was in a condition to work upon so far as the grade pegs were concerned;* can't say how much of it; but *the major part of it was not in a condition to grade; that is,* '(it)' *had no grade pegs set.*" * * * *

There were no pegs set at the upper camps; at any rate I could not find them.

There were pegs set at the lower end of the line, conveniently near to the Oak Hill Camp. I am satisfied there was grading done, and grade pegs set at the lower end of the line; but for what distance I cannot say." (Fols. 466–8.)

CROSS-EXAMINED.

"I would not state the distance for which grade pegs were set; *they might have been set for a half of a mile or a mile.*" (Fol. 470.)

TESTIMONY OF APPELLANT'S WITNESSES ON THE SAME POINT.

ALBERT T. TAYLOR—d.—On cross-examination :—"I think that about the 18th or 19th of March, 1853, the Company received a letter from George Gordon and Kinyon, demanding the grades and levels." (Fol. 625.)

A. J. BIRNEY—d.—Was Chief Engineer. "It was part of my duty to fix the levels, set the pegs, etc.; to furnish the grades and other matters connected with the work. As Engineer, personally, *or through my assistants*, furnished Mr. Gordon with the levels and grades, and run the lines."

"The grade pegs of the entire line to the American, were set before the work was let. These pegs were 33 feet from each other; either 33 or 36 feet apart, my impression is 33."

"After the grade was dug into the hill, it became necessary to set more pegs at reasonable distances from each other, on both sides, in order that the flume might be laid with sufficient accuracy; these were set as fast as the digging would allow."

"The contractors were at no time—*so far as I know*, put to any inconvenience or delay for the want of grade, during the progress of the work."

"The Company at all times kept a sufficient force at work for all purposes of engineering or superintending."

"I recollect that, once or twice, Mr. Gordon made demands for additional levels, but I never could understand why, for I was there all the time. There was not the slightest necessity for it." (Fols. 675–6.)

CROSS-EXAMINED.

"The grade pegs were set before the contract was made; these pegs, I think, were 33 feet apart —*perhaps* 66—*and were set in one line to show the digging was to commence along the side of the hill;* I am not sure they were set before the advertisement was made for proposals; I think some of them only; but they were all set before the contract was made: these pegs were set just before the contract was made; I superintended the setting of *a portion* of these pegs myself; the rest were set by my assistants."

"It was necessary to set new pegs over the entire line before the flume was laid, so that the grade should be regular; this was done as fast as excavated."

"*There was surveying done along the line after Gordon commenced work, which consisted in setting these second series of pegs.*"

"There was always an engineer on the road, *at not over one day's interval*—either myself or one of my assistants—and whatever Mr. Gordon wished was always attended to then and there; there was never any cause *for Mr. Gordon to demand from*

me the setting up of any pegs; I never could understand why he asked for any."

"At the receipt of one of Mr. Gordon's notes, which asked for pegs, which was handed to me at Placerville, I immediately went on the work, *but failed to discover that he was in want of anything.*"

" Mr. F. Baker was rodman on the work, *and may have set the first line of grade pegs;* I don't recollect whether Mr. Turner assisted or not ; *nor do I recollect whether Baker was at the upper or lower end of the work;* I don't recollect that Kinyon ever demanded any grade pegs *from me; I don't recollect that he complained for want of pegs.*"

"*I suspected that Gordon was seeking a pretext to break with the Company, and hence made these demands for grade pegs, and I was very particular to give him no cause in that way.* (Fols. 680–682.)

OBED HARVEY—d.—Was member of the Board of Directors at the time the contract was entered into.

" Grades and levels were furnished the contractors by the Engineer in accordance with the contract ; *that was the report to us.*

I have no personal knowledge of the grade pegs being set after the contract was signed ; I know of grade pegs being set there before.

I know that the Company instructed the Engineer to set grade pegs as they were needed." (Fols. 580-81.)

CROSS-EXAMINED.

"I think two letters came into the Board *demanding grades and levels;* I don't recollect when, except, I think, in March (demanding grades and levels for the whole line); Andrew J. Binney was Engineer of the Company." (Fol. 599.)

GEORGE R. TURNER—d.—"Was Assistant Engineer; I think I commenced work on the 26th March, 1853, on that line; stakes every two rods had been placed along the whole line, and I presume they were commenced at the cañon and ran up to the river; the grading could have been done *on a portion of this line by pegs*, on another portion *not, as some error had been made.*"

"I don't recollect the distance which this error affected; *I think the pegs were about two feet too low.*"

"It could have been corrected as the work progressed by a competent man as foreman; all that was necessary was to raise the sills two feet as the work went on."

"In all works of this character it is not expected that the work will be exactly on the grade at first—levels have to be taken and the work trimmed up to effect this."

"I commenced at the cañon and put in grade pegs every two rods until I reached the river, except where, by reason of bends or from other cause, it was necessary to place them closer; these pegs were for the contractor to work by in digging

his first excavation: these pegs were located in the same line the others were, *except at the place where the error had been made;* they were placed for the laborers to work by." * * *

"The first work necessary for a contractor to do upon the line of a canal would be to *remove the brush, grub it up and remove the trees; the first line of stakes would be sufficient for this purpose, and indicate the line of work accurately enough; there was no delay while I was there, such as would prevent Gordon from working his hands.*" * * *

"I don't remember that Mr. Gordon ever asked me to set a grade along that line; *Mr. Kinyon did several times*, and whenever he did he got them; Kinyon never asked me for grades ahead of my own work on the line." * * *

"It was my duty, as Engineer, to see that the surveying along the line was done as rapidly *as desired by Gordon and Kinyon.*" * * *

"I had done my work up the line above Gordon and Kinyon's camps, before they were ready to do any work; they were working behind me all the time."

"The most convenient and profitable points for the contractors to work at would be those nearest their camp." (Fols. 660–8.)

It is impossible, upon reading the testimony, to avoid the conclusion that the Engineer colluded with the Company, for the purpose of delaying

the completion of the work in the specified time, in order, if possible, to procure an ultimate forfeiture of compensation, and to prevent the fulfillment of the contract. The appellants now insist, that the excuse cannot avail the appellee, because he did not stop work immediately upon the first discovery of neglect on the part of the Company, in the particular above mentioned.

The rule of law, however, is not as contended for by the defendants.

"In all cases the promissor will be discharged from liability if he be prevented by the act or default of the other contracting party, from completing the contract within the time limited." (Chitty on Contracts, 634; 2 Parsons on Contracts, 188.)

The covenantee can rarely know with certainty whether one or two instances of neglect on the part of the covenantor will, or will not disable him to perform.

Notwithstanding a few delays, caused by the other party, he may by redoubled exertions, succeed in completing the work in the appointed time; and yet the third or fourth neglect may render success demonstrably impossible.

When at last it becomes evident that a failure must inevitably ensue, the question will naturally arise, by whose default? If occasioned by that of the covenantee, he will be unable to claim a forfeiture.

There is no rule or principle of law, which precludes the covenantee from showing that his want of success was caused by the neglect or misconduct of the covenantee, merely because the covenantor continued his efforts to succeed after the first indications of such neglect.

"*Holme et al.* vs. *Guppy*, 3 Meeson & Welsby, 389."

There are cases, it is true, in which, if a party objects, he must do so promptly, or he will be deemed to have waived the objection. As, where a contract is made for work to be done at a stipulated price, and it is discovered *before the work is commenced*, that there is a misrepresentation in respect to its value, the party engaging to do the work may repudiate the contract; but if he go on to perform it, he can demand more than the contract price.

Saratoga R. R. Co. vs. *Row*, 24 Wend. 74.

The above rule stated, is undoubtedly correct; it is founded on a principle too clear to be questioned, but it has no application to the case at bar.

In cases where the controversy respects the time of performance, whenever a failure occurs in that particular, it is sufficient to show, as an excuse for such failure, that it was caused by the neglect, or acts of misconduct of the other contracting party.

Second. The contract was violated on the part

of defendants in other essential particulars. It is manifest that the Engineer, on the first of June, 1863, did not honestly make an estimate of the whole work then done.

TESTIMONY.

HENRY M. HEWETT. "At the estimate made by Binney, Chief Engineer of the South Fork Canal Company, in June, he refused to estimate all the timber for the tressel-work that was not within one hundred and fifty feet of the grade—that being the contract, as understood by him. *But it is not the contract.*"

"I was particular in finding out how much of the timber I had got within one hundred and fifty feet of the grade, so that he could estimate it."

"Of the timber prepared for the work, the proportion within the one hundred and fifty feet of the grade was small, very small. He said he could not, or would not, estimate any timber not within one hundred and fifty feet of the grade."

"Of the whole timber got out I should think there was but ten per cent. of it within one hundred and fifty feet of the grade." (Fol. 559–60.)

FREDERICK BAKER. Was in service of the Company. "I went over the line in June, 1853, with the Chief Engineer while he was making the estimate, and sometimes I helped him. He only estimated the grubbing and the grading that was

done, ——— the lumber *that lay along the grade*, and some tressel-work that had been put up. He estimated *probably one-half* of the work that had been done; can't say exactly. I believe what he estimated amounted to $16,000. * * The timber that was not estimated by Mr. Binney was known to him, but was not in sight, except a small portion of the slides." (Fol. 451.)

ON BEHALF OF APPELLANTS.

A. J. BINNEY (Defendant and Director)—d.—"The Engineer's estimate made by me will show the amount of work done, its condition, materials on hand at the time. The estimate was carefully made at the time, and was intended to be just to Mr. Gordon, *but not liberal*. (Folio 676.)

CROSS-EXAMINATION.

"I estimated everything, but cannot state the amount of any item. I estimated all materials intended for the work, and everything in and on it. My impression is Kinyon was with me."

"I am certain that all the work done that I could find was estimated, and I searched thoroughly. I cannot state what amount was for timber. There might have been some pieces of timber in the woods not included—but think it scarcely possible. Kinyon was with me, I think. I don't remember the valuation placed by me upon any item in that estimate; I measured all that was

hewed, *and tried to do him exact justice;* measured the work *honestly*, though *not liberally*."

"I put the estimate low on purpose to give him no opportunity to quit the contract with more money than was due him, but less if either way, and trying to be exact and precise, and not on account of the financial condition of the Company; my estimate was low, but not unjust, and all he had a right to demand under the contract."

"I think, but don't know, that the Company at that time was embarrassed for money; at the time I made the estimates I was a stockholder of the Company." (Fols. 683–5.)

It will be observed that the Engineer undertakes to create the impression that the contract was not violated by the Company in this particular.

It is nevertheless evident from the concurrent testimony of the other witnesses, who are more entitled to credit, that he did not include in his estimate any of the lumber or materials lying at the time of the estimate beyond one hundred and fifty feet from the line of the canal; and it is equally evident that by limiting his estimate as first stated, he excluded nine-tenths of all the work done and materials furnished, from his estimate.

If actuated by an honest intention, it is impossible to conjecture the reasons that induced him so to act. There is no provision in the contract

that will warrant or can be construed into a justification of such an estimate. His failure to estimate the whole amount of the prepared materials was not only *illiberal*, but grossly illegal and unjust.

Third. This is not all; when this estimate, such as it was, had been made and presented to the Company, they were not ready on their part to pay eighty per cent. thereon according to the contract.

TESTIMONY.

JOHN HUME.—"I think the whole amount of the" (June) "estimate was $15,800 and something."

"A sum of money amounting to $4,000 had been paid to Gordon and Kinyon on the estimate."

"On the sixth or seventh of June, 1853, I went to the President and Directors of the S. F. Canal Company, then in session, and demanded of them the sum due Gordon and Kinyon on the June estimate, on behalf of G and K., and by their request." * * *

"I demanded the balance, whatever it was." *

"They replied to me that they did not have the money at that time, but would have it in a few days, and informed me that they were then making an effort to raise the money; I informed them upon non-payment that Mr. Gordon abandoned the contract, and delivered the letter of G. & K. (Exhibit A attached to deposition.)

"A day or two after the delivery of the first letter (A) Mr. C. C. Batterman, Secretary of the S. F. C. C., after dark of the day, came to me on the side-walk; he had with him what seemed to be a purse of money, and said he wanted to tender to me the amount due Gordon & Kinyon on the contract; I informed him that I had no authority to receive it; he then inquired *where Jno. Kinyon was;* I told him I did not know, and then he left me." (Fols. 392–394.)

C. C. BATTERMAN.—"The estimate was made and the money was tendered within a day or two thereafter; this tender was made to Kinyon sometime in the evening about ten o'clock; don't know whether Kinyon was in his bed, etc.; was in his room." (Fol. 492.)

JOSIAH L. ATKINSON.—Was elected a member of the Board first of June, and says that the Company were embarrassed at that time; he loaned $1,000 to assist in raising the $4,000; the Company were trying to borrow money enough to pay what was due on the June estimate.

"The Company, to my knowledge, had not the means to pay at that time."

Within a day or two thereafter, true, the Company did pay the sum of four thousand dollars—about one fourth of the unjust estimate—and verbally promised that the balance should be forthcoming in a short time. (Fols.427–430.)

II.

The transaction between the Company and Kinyon whereby the alleged release was procured, is too transparent to conceal the intended fraud upon the rights of appellee to escape scrutiny, and clearly appellee was unaffected thereby.

TESTIMONY.

JOHN KIRK.—Who, under agreement with the Company, completed the work commenced by Gordon & Kinyon, testifies: that Kinyon first proposed to the Company to sell out to James S. Law; the Company objected on the ground that he had not the means to finish the work; the Board thought he had better sell to the Company.

Kinyon made a proposition—the Board accepted it; it was all concluded Tuesday night; next day K. left for Sacramento, thence to San Francisco; A. J. Binney and D. J. Lyon went along; at San Francisco K. stopped at a house near the wharf, and next morning departed for the East on the Panama steamer. "Binney told me he knew Kinyon was going to leave the State." *

All the Directors knew that Kinyon, "upon the execution of his release, meant to leave the State."

"The arrangements were to be kept secret so that Gordon should know nothing of them until Kinyon had left." (Fols. 515–26)

JAMES S. LAW.—Testifies to the same facts, and particularly to the fact that Kinyon concealed himself from Gordon, admitting that the release was an intended "swindle upon Geo. Gordon," and the knowledge of this fact by the Company. (Fols. 402–24.)

J. L. ATKINSON.—Conversed with members of the Board and Company, when the release was under consideration, touching the character of the transaction; Atkinson was then a Director; in that conversation it was suggested that the transaction was unjust to Gordon, and dishonorable on the part of the Company.

JOHN C. JOHNSON.—Had conversations with the Board or some of its members about the time the work was suspended; they advanced the idea that they had counted on the inability of Gordon to complete the work according to contract, whereby they could claim a forfeiture and recover damages; they were justifying their failure to pay the estimate on that ground." (Fol. 461.)

WM. H. SMITH.—On behalf of the defendants, testifies concerning the tender of the balance due on the June estimate:

"It was to Kinyon in his room, and he refused solely on the ground that the Company had relieved him from performance."

"His refusal was solely based upon the ground

of the forfeiture as the contract by the Company." (Fol. 652.)

It would seem Kinyon first proposed to the Company to sell out the contract to Jame S. Law; they objected on the ground that Law had not the means to finish the work; the Board of Trustees suggested that he had better sell to the Company. It will be remembered that Kinyon had no means; Gordon was the capitalist and made all the advances, which fact was well known to the Company, both before and after the date of the contract. They therefore sought to bribe Kinyon to betray the confidence imposed in him by Gordon; accordingly, as the testimony shows, they paid him two thousand dollars in money, and issued to Kinyon, in the name of his wife, certificates of stock of the Company for three thousand dollars at their nominal value. The whole transaction was begun and concluded the same night; early next morning Kinyon left for Sacramento; thence he proceeded immediately to San Francisco, where he concealed himself at a house near the wharf of the Pacific Mail Steamship Company; on the morning thereafter he embarked on the mail steamer for the Eastern States. The Directors of the South Fork Canal Company knew of Kinyon's purpose to leave the State immediately upon executing the release, and arrangements were concerted by them for keeping

the matter secret from Gordon till after Kinyon's departure.

The conclusion is unavoidable that this transaction with Kinyon, whereby the Company obtained the fraudulent release, was but the consummation of a deliberate scheme on their part, conceived long before, to swindle and cheat Gordon out of the fruits of his money and enterprise. The idea that the Company can found a defense upon that release is too preposterous to be seriously entertained for a moment.

Clearly the Company knew that Kinyon had no interest whatever in the contract or profits thereof until Gordon was reimbursed his advances and all the money that had been expended upon the enterprise, and then only in one-third of the net profits, and so had no right to do more than release or discharge his own interest, for which he was paid by the Company as above stated.

Just previous to this arrangement with Kinyon, and before the Company felt assured that he would lend himself to the accomplishment of their fraudulent schemes by making a formal release of the entire claim, they had, as alleged in their sworn answer, offered to pay the contractors, by way of compromise, the sum of twelve thousand dollars in cash.

Thus far the South Fork Canal Company seem to have succeeded in accomplishing their fraudu-

lent intent. They had succeeded in procuring an extensive accumulation of materials, the completion of nearly all of the grading, the construction of slides, the opening of roads, railways, the erection of mills, and in fact everything necessary to the prompt and ultimate completion of the whole work; and they had at the same time adroitly managed, by various means, as hereinbefore stated, so to obstruct and retard the progress of the work as to render its completion within the time specified an utter impossibility. Conscious of the fact of their own delinquency and of the consequent ability of the contractors to excuse their ultimate failure, they did not feel entirely safe from legal responsibility. Hence they resorted to a fradulent transaction, equally culpable with their previous neglect and misconduct towards the contractors, for the purpose of escaping such responsibility.

III.

It is contended by appellants that it was physically impossible for the contractors to perform a work of such magnitude within the time specified, even if the Company had in all things complied with tee undertaking on their part.

It is perfectly apparent to the Court that the non-fulfillment of the contract on the part of the complainant was attributable to the neglect or

misconduct of the Company, or at least that the work was necessarily retarded by such neglect or misconduct, it will not indulge in any conjecture touching the possibility or impossibility of completing the work at the appointed time, apart from the delay so occasioned.

There is another reason, however, why the argument cannot avail the defendants. They are in fact precluded from making such a point, inasmuch as they have in their sworn answer, alleged the truth to be exactly the reverse of the position they now assume. They there state that the time was amply sufficient within which to complete the contract.

IV.

Does our statute provide for a lien upon this canal?

The Act providing for the lien of Mechanics and others, passed April 12, 1850, declares:

Section 1. "All master-builders, mechanics, lumber merchants, and all other persons performing labor or furnishing materials for the construction or repair of any building or wharf, shall have a lien separately or jointly upon the building or buildings, or wharf, which they may have constructed or repaired, or for which they may have furnished materials of any description, to the extent of the labor done and materials furnished, or both."

(*Comp. Laws of Cal.*, p. 808.)

By a supplemental Act, passed May 17, 1853, it was provided:

Section 1. "The Act entitled an Act to provide for the lien of mechanics and others, passed April 12, 1850, shall be so extended as to include in its provisions ditches, flumes, or aqueducts, constructed to create hydraulic power, or for mining purposes; and all master-builders, mechanics, contractors, journeymen or laborers, and all other persons performing labor or furnishing materials for, or employed in the construction or repair of any bridge, ditch, flume, or aqueduct aforesaid, shall have the same lien, subject to the same provisions and regulations, as in and by said Act is provided for liens upon buildings and wharves."

(*Id.* 811.)

Section 7 of the act of 1850, which was thus extended, provides that the person wishing to avail himself of the provisions of the first section, shall, before the expiration of sixty days after the completion of the building or repairs, file notice of his intention to hold a lien.

Section 8 provides that such lien shall not bind the buildings or wharf for a longer period than one year after the work is done, or material furnised, unless suit be brought to enforce the same within that time, etc.

1st. The first question which arises in this case is, whether the provisions of the laws of

1853, as to bridges, flumes, ditches, etc., apply to the facts disclosed by the pleadings and proofs, so as to give the complainant a lien for the labor done, and material furnished, it being suggested by defendants that the contract mentioned in the bill was made prior to the passage of the act of 1853.

(1 *McAllister Rep.* 513.)

It is the fact, that the work is done, and the materials furnished, which gives the lien under the notice.

The law applies in all cases where "*the labor has been performed* or *materials furnished*, subsequent to the passage of the act;" and this is so clearly the intent of the law that it has been repeatedly held, under a similar act, that the lien exists by its operation. notwithstanding the *contract* between the parties, under which the work was done or materials provided, was made prior to the enactment of the law.

Sullivan vs. *Brewster*, 1 E. D. Smith, 681.
Donnelson vs. *O'Connor*, Id. 695.
Miller vs. *Moore*, Id. 739.

The language of the statute of New York of 1851, referred to in the cases above cited is that:

"Any person who shall hereafter, by virtue of any contract with the owner thereof, or his agent, in conformity with the terms of such contract, perform any labor or furnish materials, shall upon

filing the notice prescribed in the sixth section thereof, have a lien, &c.

Hauptman vs. *Catlier*, 2 E. D. Smith, 676.

In that case the contract was made prior to the passage of the act, and part of the work was performed and a portion of the materials furnished. It was held that the plaintiff acquired a lien under the act, notwithstanding the contract was made before; but it was limited to the work done and the materials furnished thereafter.

Again in *Dennistoun* vs. *McAllister*, 4 E. D. Smith, 733, which was an action brought by a contractor against the proprietor for work done in excavating cellars, the defense was that plaintiff had not completed his work; that fact was proved by the evidence; but it also appeared that the completion was prevented by the fault of the defendant.

It was said by the Court that: "For the amount of work done under the contract, where the other party prevented its completion, a lien may be acquired; but such lien cannot be extended to damages for the breach of the contract not performed."

It is not the contract which gives the lien. It is the statute, operating upon the fact that work has actually been performed upon the property charged; or that materials have been furnished which are incorporated with, and become part of, the property itself.

Our statute differs from that of New York in this: that it does not contain the word "contract," nor any other of similar import.

The first section of the act of 1850, as extended by the supplementary act of 1853, may be read thus:

"All master-builders, mechanics, lumber merchants, and all other persons performing labor or furnishing materials for, the construction or repair of any building or wharf, or performing labor, or furnishing materials for or employed in the construction or repair of, any bridge, ditch, flume or aqueduct, shall have a lien, separately or jointly, upon the building or buildings, or wharf, bridge, ditch, flume or aqueduct, which they may have constructed or repaired, or in the construction or repair of which they may have been employed, or for which they may have furnished materials of any description, to the extent of the labor done, or materials furnished, or for both."

The lien thereby given does not depend on the fact that the work is done or materials furnished in pursuance of a contract made after the passage of the act. It is not necessary that there should be any special contract in regard to it. It is sufficient if the circumstances are such that the law would imply a promise, or liability, to pay for the work performed or materials furnished.

2d. The notice prescribed by the seventh Sec-

tion of the act, was given in due time. The only limitation, as to time, is that notice shall be filed "before the expiration of sixty days after the completion of the building or repairs."

There is some obscurity in the provisions contained in Section 7, when viewed with reference to the notice to be filed by the one who furnishes materials, if in fact he is required to file a notice at all. The materials which enter into the structure might, in some instances, be actually furnished and used more than one year before the work is finished; and yet by Section 8, the material-man, unless credit has been given, is bound at his peril to bring suit within one year after the materials have been furnished. But, turn again to Section 7, and it will be perceived that if the material-man is required to file a notice, in order to hold a lien, he has until the expiration of sixty days –not from the date of the delivery of the materials, but from the completion of the building, wharf, bridge, ditch, flume or aqueduct, within which to file it.

If, however, the person who furnishes materials is required by any construction of Section 7, to file a notice, and further, to file it within sixty days from the date of furnishing such materials, then we say that the notice was filed in due time.

The time could not commence to run until the Company actually appropriated the materials.

In *Hunter* vs. *Blanchard*, 18 Ill. R. 323, an effort was made to enforce a lien for materials furnished pursuant to a contract to purchase the same for the construction of a building.

The statute of Illinois contained this provision:

"Section 1. Any person who shall, by contract with the owner of any piece of land or town lot, furnish labor or materials for erecting any building, or the appurtenance of any building, on such land or town lot, shall have been a lien on the whole tract or town lot, in the manner herein provided, for the amount due to him for such labor or materials."

"Sec. 2. Provided the lien shall extend to all work done or material furnished, under the provisions of the contract, whether the kind or quality of the work or amount to be paid be specified or not."

In that case, it appears that the materials furnished for the purpose, had not in fact been used in the construction of the building. though the Court below had given a decree in favor of the material-man. The Appellate Court say:

"In the instructions the Court [below] substantially construed the law as giving a lien whenever a contract for the furnishing of materials to be put in a building on the lot; and in pursuance of such contract, materials have been furnished, whether those materials, thus furnished, were ac-

tually used in the erection of the building or not. We do not so understand the law. The Legislature only intended to give this lien for the materials actually used in, or the labor really bestowed upon, the building situated upon the premises against which the lien is sought to be established. The object of the law was to allow the party to pursue the thing *actually* furnished. Two things must concur to create the lien—*first*, the contract; and *second*, the furnishing of the material actually used. Suppose, in this case, that there was a contract made, and, in pursuance thereof, the lumber was furnished, which was found to be unsuitable for the building, and was consequently sold to other parties and never put into the building at all, but the lumber actually used was furnished by another under another contract. The statutes certainly give a lien to the one who furnished the lumber which was used in the building, and to the workmen who did the work in the erection of the building; and yet, according to the construction given by the Court below, the party who made the first contract and furnished lumber *never used*, acquired a lien *upon the same building and premises*."

"The very essence of the lien created by this statute is the furnishing of the materials of which the building is constructed. The Act continues in the party furnishing the materials of which the

building is erected, a *quasi* property in those materials, and others with which it has been commingled in the building, and allows him to follow it, thus transformed, for the purpose of getting his pay." (323, 324.)

It was not the fact that Gordon prepared a vast amount of lumber, pursuant to his contract, suitable for structures intended ; but the reception and actual appropriation of that lumber, the use of it in the construction of flumes, and other fixtures, appertaining to the South Fork Canal, which conferred on him the right to hold a lien under the statute.

V.

The appellee is not precluded from his lien to the whole canal by the interlocutory decree, and such lien is not barred by time.

The report of the master, upon which the final decree is based, was filed on the second day of December, 1864, and due notice thereof was given on the day following.

No exceptions were taken to this report, more than one month intervening before the same was confirmed, and the record contains no exceptions to this report, which cannot be made for the first time in this Court, but must be made in the Court below, in accordance with Rule LXXXIII, in Equity.

Story vs. *Livingston*, 13 Pet. 359, 366.
Wilkes vs. *Rogers*, 6 Johns. 566.
Dexter vs. *Arnold*, 2 Sum. 108.

If exceptions had been duly taken to the report, the appellant is clearly entitled to his lien upon the entire canal, as determined by the final decree.

With reference to the adjudication of the interlocutory decree, together with the extension of the lien, the Court is respectfully referred to the opinion of the Circuit Court (pages 279-281), and the authorities therein cited. As a matter of fact, "the canal was an entire thing."

The following authorities are cited upon the same subject matter:

Harmon vs. *Cummings and wife*, 43 Pa. State R. 322.
Driesback vs. *Keller*, 2 Barr. 77.
Lightfoot vs. *Krug et al.*, 11 Casey, 348.
Findlay vs. *Roberts*, 19 Geo. 163.
Morrill vs. *Noyes*, Am. L. R. vol. 3 (new series) and notes.

TESTIMONY.

JOHN KIRKE ON DIRECT EXAMINATION.

"That part of the canal under the Gordon & "Kinyon contract above Long Cañon, and that "part below Long Cañon are part of the same "work, and each necessary to the other.

"To disconnect the two portions would lessen "their value to a very little.

"The main portion of the water for the larger

"part of the year is brought from the American "River.

"I took the Gordon & Kinyon unfinished con- "tract, because the Company was greatly indebted "to me, and the work was worth *very little* with- out the extension to the American River." (Fol. 545.)

CROSS-EXAMINATION.

"Had the Canal not been extended to the "American, the water it got from the Canons "would have kept it full for about three months "in the year."

"For the remaining nine months in the year "the water in the ditch might average six inches "deep."

"For all the purposes of a Canal, if the eight "and a half upper miles from Long Cañon were "disconnected from the rest of the Canal, the "upper portion would be *valueless.*"

AS TO WHAT PART OF CANAL CONSTITUTES SECTION "17 TO 25."

A. J. BINNEY. "I was cognizant of the fact, "that those gentlemen, (Geo. Gordon and Alonzo "Kinyon), entered into a contract with the South "Fork Canal Company, the defendants, for the "completion of the South Fork Canal from "Long Canon to the American River." (Fol. 674.)

There can be no doubt that this action was

commenced one year from the time the contractors ceased to work.

TESTIMONY.

GORDON. "Between the sixth and the thir-
"teenth of June, 1853, was there any work done
"on that portion of the Canal? If so, by whom?

A.—"Gordon & Kinyon, the contractors,
"continued on during that week their full force of
"hands, doing their full amount of work."

Q.—"In that same connection, state when
"they ceased work—what day?

A.—"I cannot state the day. I know the
"date. They ceased to work on the 13th of June,
"1853, that is to say, they ceased to prosecute
"new work; they continued along for a week or
"ten days more, two weeks I should think, clean-
"ing up and saving materials, and getting them
"into shape for future use." (Fol. 806–7.)

VI.

The appellants say that at the time the contract was abandoned, the Company had funds to pay the amount due on the estimate then made, that time is not an element of this contract, and that it cannot be apportioned. The pretence on the part of defendants, that the money was on deposit in San Francisco, subject to their check or order, is wholly untrue. The testimony before referred to shows conclusively the Company had

to resort to borrowing, in order to raise the four thousand dollars actually paid.

By the terms of the contract, it was the duty of the Company to be ready with the money upon the presentation of the estimate. They had no more right to postpone the payment for a period of five or six days than for the period of ninety days, or any other time.

The pecuniary resources of Gordon had been expended in the work already done, and in the collection and preparation of materials in pursuance of the terms of the contract. It was not contemplated by the agreement that the contractor should advance all of the funds necessary to the completion of the work, and hence the provision in the contract, that he should receive monthly payments of eighty per cent. upon fair and just estimates to be made, to which payments he did and had a right to look for a sufficient return of his means to enable him to pay his men their monthly wages, and meet other necessary expenses of the work.

He became satisfied that in consequence of the various obstructions thrown in the way by the Company, they did not intend the work should be completed within the time limited; and therefore the Company were immediately notified by the contractors, that the contract would be abandoned.

The Company having anticipated this, and knowing that such must be the result from their own misconduct, were prompt in proceeding to declare the contract forfeited; but it is apparent they were in no situation to claim a forfeiture of the contract. This is too plain for argument.

There is no necessity in going into an examination of the question, whether this is one of those cases in which time is to be regarded as of the essence of the contract. It is sufficient to say that Gordon entered into a written contract with the South Fork Canal Company, the performance of which required no ordinary amount of means, skill and energy.

It was impossible that he could have performed that contract on his part, according to its terms, without a prompt performance of it also on the part of the Company.

Even if he could have dispensed with punctual payments, there was surveying to be done, in order to enable him to proceed with the fulfillment of his engagement. The proof shows that these surveys were neglected.

The contract was violated on the part of the Company, and Gordon had a perfect right to abandon the idea of completing.

No doubt, Courts of Equity will sometimes enforce specific performance, where the complainant has failed in certain particulars, but only in cases

where such failure has been attended with no serious prejudice to the defendant; and never, where the failure has disabled the defendant to specifically perform; or where it would be inequitable to enforce performance.

It will be seen that the time of performance on the part of Gordon and Kinyon was limited. Whatever the Company agreed to do to enable Gordon and Kinyon to perform within that time, was, of necessity, to be done without delay. And in regard to the making and payment of estimates, the language of the contract is:

"In order to enable the contractor to prosecute the work advantageously, the Engineer shall make an estimate" * * * "by strict measurement," etc.

By the express terms, therefore, of the contract, the estimates and payments were to be made by the Company, in order to enable Gordon and Kinyon to complete the work at the appointed time. How, then, can it be said, that when the Company fails to do that which it is mutually agreed to be necessary to enable Gordon and Kinyon to fulfill their engagement, the latter are inexcusable in abandoning the contract?

It is said that the contract furnishes the remedy for such failure—to wit: a stipulation to pay interest at current rates. A stipulation of that character does not preclude a forfeiture, unless it

is so expressly provided in the instrument itself.

The appellants, however, argue that the contract is of such a character it cannot be apportioned.

There is nothing in that argument. "Although a contract may not in terms be apportionable nor entirely performed, it is not to be supposed, as a matter of course, that the party who has performed a part only of his undertaking, is without a remedy.

"For, though he can have no remedy on the contract as originally made, the circumstances may be such that the law will raise a new contract and give him a remedy on a *quantum meruit*.

"Thus, if one party is prevented from fully performing his contract by the fault of the other, it is clear that the party thus in fault cannot be allowed to take advantage of his own wrong and screen himself from payment for what has been done under the contract. The law therefore will imply a promise on his part to remunerate the other party for what he has done at his request, and upon this promise an action may be brought."

2 Parsons on Contracts, 35.

Hall vs. *Keepley*, 10 Barr, 532, 533.

Holme vs. *Guppey*, 3 Mees & W. 389.

The discussion of the questions involved in this case has already been too protracted. The rights of the appellee in the premises are plain

and undoubted. For such a breach of the contract as the facts of the case disclose, he, no doubt, might have brought an action at law to recover damages. And, possibly, for the sum so recovered, he might have had no lien, as contended by the appellants.

But he was not obliged to adopt that remedy. He had a perfect right, when prevented by the Company from going on to complete his work according to the terms of the agreement, to hold a lien upon the whole canal or ditch, with all that forms part of the same, for whatever sum he deserved to have on account of the work actually done, or what the materials used by the said Company were worth, and to come into a Court of Equity to enforce that lien.

If the views presented on the other side be correct, the proprietors of real estate could defeat the object of the Statute at pleasure, by throwing obstacles in the way of the contractor, for either work or materials, so as to prevent a completion of the work, and thus deprive him of that very security upon the credit of which he may have performed work or furnished materials of the value, and at an expense to himself, of hundreds of thousands of dollars.

There is nothing in the words of the Statute to sanction such views. And to give it such a construction would necessarily defeat the whole spirit and obvious intent of the Act itself.

For the work done and materials furnished and actually used, the complainant acquired a lien under the Statute. He filed his notice and brought his suit in due time. A Court of Equity is the proper forum in which to enforce his lien.

The parties now engaged in defending this cause are at best but purchasers *pendente lite*, and whether, by conveyance or otherwise, they succeeded to some of the interests of the original defendants, after all those points had been fully discussed and decided against them in the progress of the cause.

It is respectfully submitted that the decree of the Circuit Court should be affirmed.

SOL. A. SHARP,
OF COUNSEL FOR APPELLEE.

The Court is respectfully referred to the following opinions of the Hon. Hall McAllister, late Judge of the Circuit Court, and of Justice Field:

McALLISTER, J.—To the bill exhibited in this case a *demurrer* was filed; and it was sustained by the Court for want of proper averments to give jurisdiction, with liberty to amend. The complainant has done so; and one of the defendants,

D. K. Newell, has filed a plea which raises an issue as to the validity of the lien to enforce which is one of the objects of the bill.

The first and preliminary objection to the argument of this plea is, that the issue now raised was disposed of by the decision on the *demurrer*. The Court does not so consider, as its action on it was limited to the question of jurisdiction. Again, the allegation in the bill was general; it was, that notice of the lien was recorded according to law. This general averment on the argument of the *demurrer* was taken as true. The plea now filed sets forth the notice, and specifies wherein the alleged invalidity exists. The Court cannot consider the decision on the *demurrer* as precluding the defendant from setting up this defence in form of a plea.

The grounds on which it rests are,—

1st. That by the act of 12th April, 1850 (Comp. Laws, 808), no lien was given except upon buildings and wharves; and this was the only law in force at the date of the contract with Gordon & Kinyon.

The bill in this case seeks to enforce a lien upon a *canal.*

2d. That the act of 17th May, 1853 (Comp. Laws, 811), was passed subsequent to the date of the contract, and after most of the work done by the complainant had been performed. This act

prospective, and could not retroact so as to confer a lien where none existed at the date of the contract.

By these objections, it is apparent that the date of the contract is made the point of time which is to limit the operation of the act, and beyond which it could create no right. The conclusion drawn in the brief of defendants' counsel is, that "the legislature had no power to incorporate a new element into the contract, and create a lien on a canal where none existed at the date of the contract." With a view to sustain the theory that the lien affects the contract, it is urged that the labor performed, and materials furnished, could only have been done and furnished under a contract. This is true: for no cause of action can arise *ex contractu* that is not founded on contract; but that may be verbal, in writing, or implied.

The case of *Houghton* vs. *Blake* (5 Cal. 240), cited by defendants, simply affirms the principle that the materials furnished must have been so by the express terms of the contract. A reference to the case of *Bottomly* vs. *Grace Church*, adopted and relied on in the former case, will show that all that was decided is, that the statute never contemplated that a person should have the right of following the materials which he had sold in general terms, and obtain a lien upon any building to which the materials had been applied. The mate-

rials must have been furnished to the particular building on which the lien was to be enforced by the terms of the contract, in pursuance of which it was constructed.

With a view to ascertain whether the lien, under the law which creates it, operates upon the contract in this case, it is necessary to examine the legislation of this State in relation to the liens of mechanics and other operatives.

The act of the legislature of 12th April, 1850 (Comp. Laws, 808), created a lien on buildings and wharves in favor of two classes of laborers.

1st. The first were master builders, mechanics, and all other persons furnishing labor or materials by contract with the owner himself. By the 7th section of this act, this class, to secure their lien, must file in the recorder's office of the county in which the building or wharf is situated, before the expiration of sixty days from the completion of the work or repairs, notice of his intention to hold a lien upon the property declared by the act liable to the lien, specifically setting forth the amount claimed. It is also provided, that suit shall be brought to enforce the same within one year after the work is done, or materials furnished, or within one year after the expiration of any credit which may have been given; but no lien shall continue for a longer term than two years from the time the work is completed, or

the materials furnished, by any agreement to give credit.

The second class of persons, in favor of whom a lien is created, are contractors, journeymen, etc., performing labor or furnishing by contract with the masters or contractors, and between whom and the owner there is no privity of contract. This second class of persons, in order to fix their liens, are to pursue the course prescribed by the second, third, and fourth sections of the act. By these, they are required, first to look to their employer, next to the owner, which latter is only liable in cases where notices have been served upon him in conformity with the statute. No period of notice to the owner by this second class is prescribed; and the construction which has been placed by the Supreme Court of this State upon this portion of the statute is, that it intended to provide for the first class an actual lien existing *from the commencement of the work* (in this construction the Court coincides) until sixty days after its completion, leaving the second class their remedy by notice to the owner; and no time being fixed when such notice shall be given, that their lien attaches only upon tne service thereof—that this mode of proceeding was intended to prevent litigation by substituting a proceeding in the nature of an attachment; and they put this class of cases on the same footing as ordinary attachments, in which

the rule "*qui prior est in tempore potior est in jure*" obtains. (*Cahoon* vs. *Levy*, 6 Cal. 295.)

The next act of the legislature of this State upon the subject of a mechanics' lien, is that of 17th May, 1853 (Comp. Laws, 811.) It extends the lien for all labor done and materials furnished, to "bridges, flumes, or aqueducts constructed to create hydraulic power, or for mining purposes; and gives such to all persons performing labor or furnishing materials for, or employment in, the construction of any such bridge, etc., subjecting it to the provisions and regulations as in and by said act of 12th April, 1850 (Comp. Laws, 811), are provided for buildings and wharves.

It is a rule in the interpretation of statutes, that all in "*pari materia*," must be considered together. *A fortiori*, such should be the rule where, as in this case, the "provisions and *regulations* of the previous law are expressly incorporated into the more recent statute.

The effect in such case is, to make all the provisions of the old law part and parcel of the new, which are not repugnant, and which form portions of the provisions and regulations which regulate the lien.

The complainant rests his claim to a lien under the act of 17th May, 1853, for, until the passing of that act, no lien on a canal existed; but to

sustain his claim, he must show he complied with that law, and if he does so, he can be required to do no more.

It is true that the legislature of this State, on the 27th April, 1855 (Pam. Laws, 1855, p. 156), passed an act repealing the law of 12th April, 1850; but at the same time it expressly enacts, that "nothing herein contained in this act shall be deemed to apply to, or affect any lien heretofore acquired," etc.

By this latter act it is required that the notice of lien to be given shall contain a *correct* description of the property on which the lien is intended to be enforced.

The act of 12th April, 1850, required a description of the property, without using the word "correct." But this omission in the older act can give rise to no different construction in the interpretation of the two statutes.

When the previous act prescribed a description of the property, it is to be deemed that a correct one was as much required by its language as when the legislature, in the subsequent law, used the word, correct. It is only important to construe the language used in both acts with a view to enable us to arrive at the true intention of the law. To this comparison we will come hereafter, when the objection made to the descrip-

tion of the property given in this case in the notice of the lien is to be considered.

Both acts, that of 12th April, 1850, and that of 17th May, 1853, annex the liens created by them to no contract; but to labor done and materials furnished. Whatever the nature of the contract, the character of the lien is not affected. The law does not alter or impair the obligation of any contract, the lien is founded upon the labor and materials. Going upon the idea that "the laborer is worthy of his hire," the legislature make the result of his work the sole meritorious ground of the lien.

If the act operated upon the contract made prior to the passing of it, and divested a vested right, it would be obnoxious to the objection made to it on the ground that it is unconstitutional.

To sustain that proposition, the case of *The People* vs. *The City of San Francisco* (4 Cal. 127), has been cited.

That case was decided on two grounds. 1st. That by the terms of the act under consideration, the act was not to take effect until July following, and consequently was, by its saving clause, to take effect *in futuro*.

2d. That previous to the passing of the act, the right had vested in the party, as purchaser from the sheriff, to receive an absolute deed for

the property, of which he had been divested by the subsequent law giving the right of redemption.

The principle decided in the latter proposition is embodied in the case of *McCracken* vs. *Hayward* (2 Howard, 608).

The act under consideration does not attach to the contract, it goes exclusively to the remedy. It may indirectly affect the contract; but it does not impair it, nor does it divest a vested interest under it. Most legislation as to the remedy, more or less affects the contract; though it may not to such extent as to invalidate the law.

In *McCracken* vs. *Hayward*, above cited, the Supreme Court of the United States say: "It is, however, not to be understood that, by that or any former decision of this Court, all State legislation on existing contracts, is repugnant to the Constitution."

As legitimate instances of the exercise of this power, they allude to the right of the legislatures of the States to pass recording acts, by which the elder grant shall be postponed to a younger, if the prior deed is not recorded within the limited time; and the power is the same whether the deed is dated before or after the passage of the recording act. Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the

obligation of contracts. The power to limit a remedy by barring the right of action, being remedial legislation, although it affects the contract, is constitutional. (*Ibid.*)

In *Bronson* vs. *Kinzie* (1 Howard, 315), the same Court say: "Undoubtedly, a State may regulate at pleasure the modes of proceeding in its courts in relation to past contracts, as well as future. It may shorten the period of time within which claims shall be barred by the statute of limitations."

Now, each of foregoing instances, in which it is admitted the State legislatures have a right to legislate, affect the contract to as great extent as does the act under consideration, which gives to a party to a contract an additional remedy,—a lien upon his work.

In the case of *Bronson* vs. *Kinzie* (1 Howard, 316), the Court further say: "And although a new remedy may be deemed less convenient than the old one, and may, in some degree, render the recovery of debts more tardy and difficult, yet it will not follow that the law will be unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the State; *provided* the alteration does not impair the obligation of the contract."

It is difficult to perceive how an act, which

gives an additional remedy to the holder of a contract, can be said to impair its obligation.

Of what vested right does it deprive the party? The obligation imposed upon him by its terms, was to pay for the work. It vested in him no right not to pay. Can the law, which, from motives of policy gives an additional remedy and security, be said to divest a right from him which he never possessed? The true distinction is, that what belongs to the *remedy*, if it does not impair the obligation of the contract, is within the legitimate limits of State legislation.

The Court cannot consider the law under consideration as unconstitutional, or having divested a vested right.

Whether the law should be deemed to create a lien on any labor or materials done and furnished subsequent to the passage of it, is a question not now to be determined. That it does create a lien on all labor and materials done and furnished prior to the passing of it, there can be little doubt; and the plea admits that some portion of the labor and materials are in that category. Whatever be that portion is matter of proof on the trial of the case.

Another objection to the validity of the lien is, that the notice of lien filed by complainant was insufficient on two grounds—

1. The description of the property in the notice of lien is inaccurate.

2. That if the complainant ever had a valid lien, he has lost it by a failure to bring suit in time. The act of 12th April, 1850, requires that the suit should be brought within one year after the work was done, which was not done in this case.

As to the description of the property, we have seen that the act of 12th April, 1850, requires that notice of the intention to hold a lien on the property declared by that act shall be recorded, specifically stating the amount claimed. The act of 27th April, 1855, requires a correct description of the property to be given. No form is prescribed. Under the latter law the case of *Montroes* vs. *Conner* (8 Cal. 344), cited by defendant's counsel, was decided. The description of the property in the notice of lien in that case was in these words: "As a dwelling-house lately erected by me for J. W. Conner, situated on Bryant street, between Second and Third streets, in the city of San Francisco, on lot—"

In relation to the description, the Court say: "There are a number of lots on Bryant street, between Second and Third streets, to any one of which it would apply as well as to the one in question." That description of an individual object which was so inaccurate as to apply equally well to a number of objects, was decided not to

be a correct description of the individual object which it was intended to identify.

What is meant by a correct description? Does it mean a description by metes and bounds, and require the particularity demanded in a deed? The word "correct" is not a technical one. Its obvious meaning in a statute is, such description which identifies the individual object intended to be designated. Such object is accomplished in this case; the subject on which a lien is sought are "the works known as the South Fork Canal, near Placerville, in El Dorado County." If there was no object in existence at the time which answered to that description, the rule, "*de non apparentibus et de non existentibus eadem est ratio*," must apply, and the description must be deemed sufficiently "correct."

The next objection to the validity of the lien is, that the notice, after giving the information that it was intended to hold a lien on the specific work, does not state that the labor was done on, and the materials were furnished to, that work; but "that the same were for the use of the South Fork Company."

The fact that they were so used is not required to be inserted in the notice, nor does it constitute a part of the description of the property.

That is matter of allegation and proof, without

which no recovery can be had. To that extent goes the case of *Houghton* vs. *Blake*, cited by defendant's counsel.

The last objection to the validity of the lien is, that if it ever existed, it has been lost by failure to bring a suit to enforce the lien within a year from the time the work was done. Now, there is a conflict as to the time when the work was done, and inasmuch as a plea is not, like an answer, deemed evidence, and the matter is one of avoidance, and as such, if embodied in an answer, must have been proved on the final hearing, it must be submitted to proofs on both sides.

After a careful review of this case, the Court has come to the conclusion that the plea must be overruled, and it is ordered accordingly.

OPINION OF HON. JUDGE FIELD.

CIRCUIT COURT OF THE UNITED STATES, Northern District of California.

GEORGE GORDON
vs.
THE SOUTH FORK CANAL CO.

By the interlocutory decree rendered at the October Term, it was adjudged that the demand of the complainants for the work performed and materials furnished in the construction of the canal

of the defendants, from section seventeen to section twenty-five inclusive, under the contract of March 16, 1853, was, to the extent of reasonable value, a lien upon the portion of the canal constructed paramount to all other liens set forth in the pleadings, and it was referred to a master to take and state an account of the value of such work and materials, and to ascertain the amount paid to the complainant, and report the same to Court.

The master was also directed to compute the amount of interest due on the estimated value of the work and materials, from June 13th, 1853, to the date of the computation, at the rate of ten per cent. per annum.

In December last the master made his report, and no exceptions being taken to it by any of the parties, it was confirmed under the eighty-third equity rule of the Court.

The master found the value of the work bestowed and the materials furnished in the construction of the canal, from section seventeen to section twenty-five inclusive, to be $76,598 89, and the amount paid to the complainant upon the contract to be $6,200, and the computed interest due on these sums up to November 30, 1862,
The master also found the value of what he termed preliminary work and materials, that is, for work done and materials furnished in prepara-

tion for the construction of the canal, such as the building of saw-mills, railroads, inclined planes, blacksmith shops, charcoal pits, hoisting and lowering apparatus, and the like; but the demand for work and materials of this character is not a lien upon the canal. The lien given by the law is intended for the security of the work actually performed upon, and the materials which enter into the thing constructed, and of no other. The expense of machinery and tools used are the proper subjects of inquiry by laborers and contractors in fixing a charge for their work, but do not constitute distinct items for consideration in addition to the work itself, in determining the amount for which a lien should attach upon any particular structure.

The lien will therefore be only allowed for the amount of $76,598 89, and interest thereon from June 13th, 1853, after deducting the sums paid to the complainant, with interest.

The more important question for determination is, whether the lien shall be declared to extend upon the entire line of the canal, and be enforced upon the whole, or be declared to exist upon the sections actually constructed under the contract, and be enforced only against that portion.

In the interlocutory decree a lien was only declared to exist upon the sections named. Our

attention in considering the case has been especially directed to the question of the existence of any lien, and little had been said by counsel on either side as to the extent of the canal upon which the lien, if declared, would attach. Upon the final hearing our attention has been particularly called to this matter, and, from the reading of the statute, we are satisfied that we erred in limiting the lien to the particular sections named. The canal is to be regarded as an entire thing, as a building is to be regarded to which additions or repairs are made. The lien is obviously not restricted to the wing added, or to the chamber or roof repaired, but extends to the whole structure. The statute of April 12, 1850, provides that "All master-builders, mechanics, lumber merchants, and all other persons performing labor or furnishing materials for the construction or repairs of any building or wharf, shall have a lien, separately or jointly, upon the building or buildings, or wharf, which they may have constructed or repaired, or for which they may have furnished materials of any description, to the extent of the labor done, or materials furnished, or both." (Laws of 1850, chap. 87, sec. 1.)

And the statute of May 17, 1853, declares that the previous act of 1850 "shall be so extended as to include in its provisions bridges, ditches, flumes, or aqueducts constructed to create hydrau-

lic power or for mining purposes; and all master-builders, mechanics, contractors, journeymen, or laborers, and all other persons performing labor or furnishing materials for or employed in the construction or repair of any bridge, ditch, flume, or aqueduct aforesaid, shall have the same lien, subject to the same provisions and regulations as in and by said act is provided for liens upon buildings and wharves."

(Laws of 1853, chap. 148, sec. 1.)

As will be perceived by this last act, the lien is given upon the bridge, ditch, flume, or aqueduct, that is, upon the whole of each work, not upon a part of either, where labor is performed, or materials are furnished for, or employed in their construction or repair.

It is not essential to create the lien that the labor or materials should cover the entire work; the lien goes upon the whole for the construction or the repair of any portion.

The statute leaves no room for doubt on the question presented, but determines it in favor of the complainant.

And there is nothing in the adjudication of the interlocutory decree which prevents the extension of the lien on the final hearing. A court of equity can, at such hearing, or at any time before, enlarge or restrict, or otherwise modify, the provisions of its interlocutory orders or decrees,

either upon the petition of the parties, or upon its own further consideration of the law and the evidence; the whole case is under its control until the final decree is rendered.

Calk & Arear vs. *Stribling*, 1 Bibb. 12.
Cook's Heirs and Creditors vs. *Bray*, 4 How. Miss. 485.

A decree will be entered extending the lien, and directing a sale of the entire canal, and the application of the proceeds to the payment of the demand of the complainant as stated in this opinion.

FIELD, J.